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In the

Supreme Court of the United States

October Term, 1994

Secretary of Public Welfare
of the Commonwealth of Pennsylvania,

Petitioner

v.

Idell S.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state violates Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12131-12134 (prohibiting discrimination against disabled persons in public services), or its regulation at 28 C.F.R. § 35.130(d) (requiring public services to be provided in the most integrated setting appropriate), when it has not deprived a disabled person of any service or benefit based on disability, but rather has placed her on a waiting list for social services for the disabled because of funding limitations.

2. Whether either the statutory language of Title II of the ADA or 28 C.F.R. § 35.130(d) constitutes a statement sufficiently "plain" so as to impose on the states an obligation to deinstitutionalize, in all "appropriate" cases, physically and mentally disabled persons now residing in institutions.

3. Whether the ADA or 28 C.F.R. § 35.130(d) requires the "fundamental alteration" of a state-created social service program into an entitlement, in violation of state statutory and constitutional law.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

The Secretary of Public Welfare of the Commonwealth of Pennsylvania respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A-1–A-25) is reported under the caption, *Helen L. v. DiDario*, at 46 F.3d 325. The opinion of the United States District Court for the Eastern District of Pennsylvania (App. A-30–A-40) is unreported.

JURISDICTION

The court of appeals entered its judgment reversing the district court on January 31, 1995 (App. A-1). The court of appeals denied a timely petition for rehearing and suggestion for rehearing en banc on February 24, 1995 (App. A-41). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

(reproduced in Appendix)

Federal	**App.**
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STATEMENT OF THE CASE

Idell S., a physically disabled nursing home resident whose care was funded under Pennsylvania's medical assistance program, sued the Secretary of Public Welfare for failing to provide immediate home-based "attendant care" services, alleging a violation of the "integration" requirements of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-12134, and its regulation, 28 C.F.R. § 35.130(d). Idell S. had been placed on a waiting list for such services due to funding limitations. The nursing home and attendant care appropriations are separate appropriations; the former, pursuant to federal law, is an entitlement, the latter, a state-created program, is not. The district court entered summary judgment in favor of the Secretary. The court of appeals reversed, holding that the ADA requires immediate provision of attendant care.

The Attendant Care Program

In 1986, the Pennsylvania General Assembly enacted the Attendant Care Services Act (Act), 62 P.S. §§ 3051-3058 (App. A-47–A-50), which established a program of attendant care services (e.g., bathing, dressing, feeding) for physically disabled persons in private home settings in order to reduce the need for nursing home or other institutional care. Under the Act, the availability of services each fiscal year is expressly limited by the appropriation level set by the General Assembly, *id.* at § 3055(e), and a waiting list for services is expressly contemplated, *id.* at § 3054(h). The Act provides that the Department of Public Welfare will administer the program. *Id.* at § 3054(a).

Proceedings Below

In 1992, Helen L., a patient at a Pennsylvania state mental hospital, filed an action in United States District Court against the hospital superintendent, Albert DiDario (in his individual and official capacities), and Karen F. Snider, then Secretary of Public Welfare (in her official capacity only). Jurisdiction of the district court was invoked pursuant to 28 U.S.C. §§ 1331 and 1334. Asserting violations of substantive due process rights and the ADA, 42 U.S.C. §§ 12101 *et seq.*, Plaintiff sought injunctive relief in the form of community placement against both Defendants. Plaintiff also sought damages from DiDario for the alleged due process violation.

An amended complaint added three nursing home residents, Beverly D., Florence H., and Ilene F., whose care was funded by the Department of Public Welfare under the medical assistance program, 42 U.S.C. §§ 1396-1396v, and an advocacy organization, Disabled in Action. These additional Plaintiffs sought injunctive relief only, and alleged violation of the ADA only. For these Plaintiffs, the alleged ADA violation was the provision to them of "segregated" institutional care, i.e., nursing home services, instead of "integrated" community care, i.e., in-home attendant care, provided to others under the Department's attendant care program.

In the spring of 1993: (1) Florence H., at her request, was removed from the case; (2) Helen L. was discharged from the state hospital and abandoned her ADA injunctive claim (but pursued her

constitutional damage claim); and (3) Plaintiffs Beverly D. and Ilene F. filed a motion for a preliminary injunction.

In the summer of 1993, the parties agreed that the ADA claim could be resolved properly by summary judgment. After stipulating to relevant facts, the parties filed cross-motions for summary judgment on the ADA claim. On January 27, 1994, the district court entered summary judgment in favor of the Secretary and denied Plaintiffs' motion for a preliminary injunction (App. A-29). The district court concluded that the Secretary had not deprived Plaintiffs of any service or benefit on account of disability. Because attendant care services are provided *only to the disabled*, the court reasoned that the Plaintiffs were not discriminated against in violation of the ADA or its regulations. The district court found that funding limitations, not discrimination, limited the availability of attendant care to the Plaintiffs (App. A-36).[1]

At the time of the district court's decision, Plaintiffs Beverly D. and Ilene F. had left the nursing home. Consequently, they were voluntarily dismissed as parties. However, nursing home resident Idell S., who was on a waiting list for attendant care, was joined as a new plaintiff. Idell S.'s motion for summary judgment was denied February 2, 1994, on the same grounds as the earlier summary judgment motion (App. A-28). Plaintiff Disabled in Action was subsequently dismissed voluntarily.

Idell S. timely appealed to the United States Court of Appeals for the Third Circuit. The Department of Justice, upon the invitation of the court of appeals to participate as *amicus*, filed a brief in support of Idell S. On January 31, 1995, the court of appeals (3-0) reversed the district court and held that the ADA's "integration" requirements are applicable to services intended exclusively for the disabled, and that the ADA, therefore, prohibits waiting lists for "integrated" services, such as attendant care, for persons receiving nursing home care (App. A-7, A-18). The court of appeals concluded that the ADA has "integration" of the disabled as a major goal, and that an ADA

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[1]The district court also denied Defendant DiDario's summary judgment motion on Helen L.'s damage claim. She subsequently withdrew the damage claim, however, and is no longer a party in this case. Order of the district court, August 16, 1994.

regulation at 28 C.F.R. § 35.130(d) ("a public entity shall administer services . . . in the most integrated setting appropriate") applies to services exclusively for the disabled such as attendant care. The court of appeals also observed that the Secretary had stipulated that attendant care costs would be lower than nursing home costs and that attendant care would be appropriate for Plaintiff (App. A-23). The Secretary petitioned for rehearing and suggested rehearing *en banc*. The court of appeals denied the petition on February 24, 1995, with five of fourteen judges voting to grant rehearing *en banc* (App. A-41).

By December 1994, Idell S. had left the nursing home to live in her daughter's home, where she receives attendant care services. Because this case involves the lawfulness of a waiting list, it is capable of repetition, yet evading review, and hence not moot. *Roe v. Wade*, 410 U.S. 113, 125 (1973). Circumstances giving rise to this litigation could be repeated if Idell S. were hospitalized and returned to a nursing home. In addition, there are many other similarly situated individuals currently residing in nursing homes.

On March 2, 1995, the district court granted Plaintiff's motion to join three additional Plaintiffs.

REASONS FOR GRANTING THE WRIT

The court of appeals did not find that the Secretary of Public Welfare deprived Idell S. of any service or benefit on account of disability, yet it concluded that the ADA had been violated (App. A-7). The court of appeals reasoned that "the ADA and its attendant regulations clearly define unnecessary segregation as a form of illegal discrimination against the disabled" (App. A-13). The fact that attendant care service is provided exclusively to the disabled, and that its unavailability to some because of funding limitations does not deprive the disabled of any service or benefit because of disability, did not, in the court of appeals' view, defeat Plaintiff's claim (App. A-18).[2]

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[2]The court of appeals acknowledged that the ADA does not directly create any obligation on states to provide any social service at all (App. A-20). It is unclear, however, whether the obligation the court of appeals found arose from the Secretary's funding of nursing home care, or because of the limited funding of attendant care.

By holding that the Secretary violated Idell S.'s rights under Title II of the ADA and its regulation at 28 C.F.R. § 35.130(d) merely by putting her on a waiting list for community care ("attendant care") instead of providing such care immediately, the court of appeals radically expanded and misconstrued the scope of the ADA. The court of appeals' decision goes far beyond the statutory language, legislative history, or relevant appellate case law under the ADA, the ADA's predecessor statute, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and their respective regulations. Indeed, the holding conflicts with the only other appellate case directly on point.

The court of appeals' decision also has immense and very troublesome implications for state or local government entities that operate or fund institutional care, for it requires *immediate* community placement whenever "appropriate" — a standard this Court has already characterized, in a closely related context, as "difficult to understand," *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 24-25 (1981) — even if funds for such services are unavailable.

This Court should grant certiorari to prevent the court of appeals' erroneous reading of the ADA from undermining — indeed, making impossible — the orderly and rational administration of social and health care services in the Commonwealth of Pennsylvania and the other forty-nine states. Rather than expanding services for the disabled, the decision of the court of appeals may force states to reduce, refuse to create, or even eliminate community services for the disabled.

I. THE COURT OF APPEALS' INTERPRETATION OF 42 U.S.C. § 12132 AND 28 C.F.R. § 35.130(d) CONFLICTS WITH THE INTERPRETATION OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, THE ONLY OTHER APPELLATE CASE ON POINT.

In *Williams v. Secretary of the Executive Office of Human Services*, 414 Mass. 551, 609 N.E.2d 447 (1993), a unanimous Supreme Judicial Court of Massachusetts rejected the interpretation of 42 U.S.C. § 12132 and 28 C.F.R. § 35.130(d) that the court of appeals adopted. The *Williams* court rejected claims of deinstitutionalized

mentally ill persons that the ADA requires expansion of programs of community care ("integrated services") to meet their needs and thereby reduce the likelihood of reinstitutionalization ("segregated services"). In *Williams*, as here, the lack of adequate community care for all was due to funding limitations, 609 N.E.2d at 453, and, as here, plaintiffs claimed community care was economically more efficient, *id.* at 454-55.

Although there are factual distinctions between *Williams* and the instant case, the legal issues were the same. *Williams* involved the mentally ill rather than the physically disabled, and the case examined several formerly institutionalized plaintiffs at risk of reinstitutionalization rather than one currently institutionalized. Nonetheless, the precise legal question was the same in both cases: does Title II of the ADA require the expansion of "integrated" community services so as to make "segregated" residential services unnecessary? The Supreme Judicial Court of Massachusetts said "no." Relying largely on this Court's section 504 case law for guidance, *Williams* held that the ADA, like section 504, "address[es] discrimination *in relation to* nondisabled persons." 609 N.E.2d at 454 (emphasis added). The court of appeals held otherwise in the instant case and expressly acknowledged its disagreement with *Williams* (App. A-14).

Both Idell S. and the *Williams* plaintiffs sought the replacement of institutional services with community services, i.e., deinstitutionalization. In an apparent effort to insulate its holding from this Court's deinstitutionalization jurisprudence, however, specifically *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), the court of appeals denied that "deinstitutionalization per se" was at issue (App. A-20). The relief it granted Plaintiff, however, precisely conforms to the ordinary definition of "deinstitutionalize": "1. to release (a mental patient, disabled person, etc.) from institutional care and treat or support with community resources. . . ." *Random House Webster's College Dictionary* 357 (1991).

II. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS.

When the court of appeals held that the ADA contains an "independent" integration requirement, i.e., one not conditioned on a deprivation of any service or benefit based on disability

(App. A-7, A-18), it crossed a line never before crossed by any appellate court, and imputed to Congress an intent never expressed.

A. The Relation of the ADA to Section 504.

Attacking an argument the Secretary never made, the court of appeals emphasized that both section 504 and the ADA prohibit unintentional discrimination as well as intentional, or willful, discrimination (App. A-16–A-17). The Secretary agrees that "willfulness" is not a necessary condition for a finding of discrimination, but believes that disparate treatment of the disabled in relation to the nondisabled *is* a necessary condition. *See Traynor v. Turnage*, 485 U.S. 535, 548 (1988). Absent such disparate treatment, there is no "discrimination."

By way of background, in 1973, Congress enacted the ADA's predecessor, section 504 of the Rehabilitation Act, 29 U.S.C. § 794, which prohibits discrimination against the handicapped in federally funded programs. The "central purpose" of section 504 was "to ensure that handicapped individuals receive 'even handed treatment' in relation to nonhandicapped individuals." *Traynor*, 485 U.S. at 548 (rejecting section 504 claim largely because it did "not involve a program or activity that is alleged to treat handicapped persons *less favorably* than nonhandicapped persons" (emphasis added)). Accordingly, where, as here, the service at issue is intended only for the disabled, a finding of "discrimination" within the meaning of section 504 will generally be precluded. *See, e.g., Johnson v. Thompson*, 971 F.2d 1487, 1494 (10th Cir. 1992).[3]

While it is true, as the court of appeals observed (App. A-9–A-10), that the ADA was intended to solve certain problems with section 504, the "basic problem" with section 504 that Congress addressed in Title II of the ADA was simply its limitation to federally funded programs. Burgdorf, *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 Harv. Civ. R.-Civ. L.L. Rev. 413, 431 n.94 (1991). The purpose of Part

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[3]There is some limited support for the view that differential treatment based on degrees or kinds of disability may be actionable under section 504 and the ADA, *see Martin v. Voinovich*, 830 F. Supp. 1175, 1191 (S.D. Ohio 1993), but Idell S. has made no such claim here.

A of Title II of the ADA, 42 U.S.C. §§ 12131-12134 — the ADA provisions construed here by the court of appeals — was explained by the House Committee on Education and Labor: to extend section 504's prohibition on discrimination to all state and local government activities, "whether or not such entities receive federal financial assistance." H.R. Report No. 101-485 (II) at 84, *reprinted in* 1990 U.S.C.C.A.N. 366. Apart from this difference, the relevant statutory language is substantially identical. *Compare* 42 U.S.C. § 12132 and 29 U.S.C. § 794:

> **42 U.S.C. § 12132. Discrimination**
>
> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.
>
> **29 U.S.C. § 794 (1988). Nondiscrimination under Federal grants and programs . . .**
>
> (a) No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his or her handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

The substantial identity of the definitions of "discrimination" in section 504 and Title II of the ADA is significant, because it means that apart from expanding the prohibition on discrimination to include non-federally funded programs, Congress intended the same results under the two statutes. *See West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 98 (1991) ("the purpose of a statute includes not only what it sets out to change, but what it resolves to leave alone").

Other authoritative sources also support the conclusion of common purpose and meaning. In Title II of the ADA, Congress directed

that regulations be promulgated consistent with certain section 504 regulations. 42 U.S.C. § 12134(a) and (b). Two House committee reports expressly declared that Title II of the ADA was intended to work in the same way as section 504, H.R. Report No. 101-485 (II) at 84, *reprinted in* 1990 U.S.C.C.A.N. 367 (Education and Labor); and H.R. Report No. 101-485 (III) at 49-50, *reprinted in* 1990 U.S.C.C.A.N. 472-73 (Judiciary). Section 504 and ADA requirements are so similar that courts routinely use section 504 case law in adjudicating ADA claims. *See, e.g., Hedberg v. Indiana Bell Telephone Co.*, 47 F.3d 928, 932 (7th Cir. 1995) ("the language of the Rehabilitation Act is substantially identical to the language of the ADA"); *Easley v. Snider*, 36 F.3d 297 (3d Cir. 1994); *Williams*, 414 Mass. 551, 609 N.E.2d 447 (1993). Accordingly, section 504 case law and regulations, as well as ADA case law and regulations, are illuminating here.

B. "Integration" Under Section 504 and ADA Regulations.

Although the court of appeals defended at length the validity of 28 C.F.R. § 35.130(d) (App. A-11–A-12), the Secretary never challenged its validity. For reasons explained below, the Secretary did, however, object to the interpretation of the "integration" requirements of 28 C.F.R. § 35.130(d) advocated by Idell S. and the Department of Justice which was adopted by the court of appeals.

A section 504 regulation, promulgated in 1978 by the Department of Health, Education and Welfare, 43 Fed. Reg. 2132, 2138, and redesignated in 1981 to the Department of Justice as 28 C.F.R. § 41.51(d), requires that recipients of federal funds "administer programs and activities *in the most integrated setting appropriate* to the needs of qualified handicapped persons" (emphasis added). The ADA regulation on which the court of appeals decision directly rests, 28 C.F.R. § 35.130(d), has very similar language: "A public entity shall administer services, programs, and activities *in the most integrated setting appropriate* to the needs of qualified individuals with disabilities" (emphasis added). Until the Department of Justice's *amicus* brief was filed in this case in 1994, however, there was neither a judicial holding nor an administrative interpretation that these regulations were *independent* of the statutory definitions of discrimination, i.e., an unwarranted deprivation of something "by reason of . . . disability." 42 U.S.C. § 12132.

For example, if a disabled person is barred from a public park and told to go to a special park for disabled persons, or barred from a public library and told to go to a special library for disabled persons, that person is being deprived on the basis of disability of access to a public service in an "integrated" setting, i.e., deprived of access to a service for the general public in a setting intended for the general public. In other words, but for the disability, he or she could use the regular park or library. Such deprivation would violate Title II and 28 C.F.R. § 35.130(d).

Prior to 1994, however, no authority suggested that social services intended exclusively for the disabled must be provided in any particular setting. The reason is clear: the unavailability of social services for the disabled in any particular setting is not deprivation of any benefit based on disability — if the disability did not exist, eligibility for the service would not exist, because the service is only for persons with disabilities. In the absence of any deprivation based on disability, there can be no violation of section 504, the ADA, or their regulations. The court of appeals' contrary view is a radical break from all prior authoritative pronouncements on this matter.

Examples of the "integration" objective of the ADA in its legislative history serve only to confirm the plain meaning of the statutory language. These examples are limited exclusively to settings or services open to the general public, such as restaurants and theaters. *See* House Judiciary Committee report, H.R. Report No. 101-485 (III) at 56-57, *reprinted in* 1990 U.S.C.C.A.N. 479-80 (back room restaurant service and segregated theater seating are prohibited). The preamble to 28 C.F.R. § 35.130(d), at 56 Fed. Reg. 35703 (1991), and the Department of Justice, The Americans with Disabilities Act Title II Technical Assistance Manual (Technical Manual) — the existence of which the court of appeals noted (App. A-2, n.1), but the contents of which it ignored — similarly limit examples of forbidden segregation under 28 C.F.R. § 35.130(d) to places intended for the general public. *See, e.g.*, Technical Manual at 11-12 (museums). Inexplicably, the court of appeals ignored these examples and broke through the reasonable boundaries these examples establish.

C. Prior Legislation, Litigation, and the *Lorillard* Rule.

In reaching its remarkable conclusion, the court of appeals committed a series of major analytical errors. Perhaps the most egregious was its disregard of the well-established rule which presumes Congress to be aware, when enacting legislation on a particular subject, of interpretations of prior law on the same subject. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978); *see also Pierce v. Underwood*, 487 U.S. 552, 568 (1988). Reenactment of specific statutory language is assumed to include "settled judicial interpretation" of that language. *Pierce*, 487 U.S. at 567.

Under section 504, deinstitutionalization claims had reached four circuit courts, and on each occasion, the deinstitutionalization claim was rejected. *See Clark v. Cohen*, 794 F.2d 79, 84 n.3 (3d Cir.), *cert. denied*, 479 U.S. 962 (1986); *Plummer v. Branstad*, 731 F.2d 574, 578-79 (8th Cir. 1984); *Phillips v. Thompson*, 715 F.2d 365, 368 (7th Cir. 1983); *Kentucky Ass'n for Retarded Citizens v. Conn*, 674 F.2d 582, 585 (6th Cir.), *cert. denied*, 459 U.S. 1041 (1982). The Seventh Circuit in *Phillips* articulated the principle that this Court subsequently adopted in *Traynor*, 485 U.S. 535, 548 (1988): because there was no deprivation of any service or benefit on the basis of handicap of services provided to the public, there was no section 504 violation. 715 F.2d at 368. The state, therefore, did not have an affirmative duty to create community alternatives to institutional care.

Under the presumption adopted by this Court in *Lorillard* and *Pierce*, Congress knew of this consistent judicial rejection of claims for community care under section 504. If Congress intended a different result under the ADA, it would have so indicated in the statutory language of the ADA, the primary material for statutory construction. *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Congress did not do so. The language of the ADA defining discrimination is substantially the same as the language of section 504, as discussed above.

Continuity is evident in the legislative history as well. As the district court in *Conner v. Branstad*, 839 F. Supp. 1346, 1357 (S.D. Iowa 1993), noted, "[T]he legislative history of the [ADA] does not even discuss [deinstitutionalization]." Under this Court's "the dog that did not bark" rule, *see Chisom v. Roemer*, 501 U.S. 380, 396 &

n.23 (1991), this silence regarding deinstitutionalization in the legislative history supports the view that Congress did not intend that the ADA produce a different result regarding deinstitutionalization from that under section 504. *See also Connecticut National Bank*, 503 U.S. at 255 n.2 (Stevens, J., concurring in the judgment) (silence on an issue in legislative history generally suggests Congress intended no significant change).[4]

The court of appeals summarily discounted the extensive and uniform section 504 appellate case law *(Clark, Plummer, Phillips, Kentucky Ass'n)* simply by noting that none of these four section 504 cases involved the ADA regulation, 28 C.F.R. § 35.130(d) (App. A-16 n.18). Despite noting the near-identity of 28 C.F.R. § 35.130(d) and its section 504 predecessor, 28 C.F.R. § 41.51(d), ratified by 42 U.S.C.§ 12134(a) and (b) (App. A-12), the court of appeals failed to explain why the two regulations would produce different results. None of the four circuit courts suggested that 28 C.F.R. § 41.51(d) was relevant to deinstitutionalization claims under section 504. If none of the four circuit courts adjudicating section 504 deinstitutionalization claims recognized any relevance of section 41.51(d), it is reasonable to conclude that the nearly identical ADA regulation, section 35.130(d), has no relevance to such claims under the ADA.

D. The Statute's Objective of Integration of Disabled Persons Cannot Impose "Fundamental Alterations."

Ignoring the *Lorillard* rule, the court of appeals relied heavily on the objective of the ADA to promote integration of disabled persons into society (App. A-12–A-13). The ADA has integration as a major objective, but reliance on a statute's objective, even a primary

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[4]The text of the ADA does expressly acknowledge the existence of "institutionalization," 42 U.S.C. § 12101(a)(3), and seeks only to end "discrimination" in connection with it, just as in other settings such as employment, housing, etc. Just as a hearing-impaired person might suffer discrimination in employment, so might he suffer similar discrimination in an institutional environment. A mental patient in a state hospital might be hearing impaired and suffer relative to other patients with normal hearing, and have a valid ADA claim, not because he is in an institution, but because no accommodation is made for him as a hearing-impaired patient. The court of appeals' attempt to read into this reference to institutionalization an obligation to provide a community-care alternative (App. A-19), is completely without merit.

objective, can be excessive, as this Court has repeatedly and strongly cautioned. *See, e.g., Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) ("it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law" (emphasis in original)). *See also Pension Benefits Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 646-47 (1990).

Here, the objective of integration must be balanced, as it is under section 504, against service providers' interest in program integrity. *See Alexander v. Choate*, 469 U.S. 287, 300 (1985). "Fundamental" or "substantial" changes in programs are not required by section 504. *Id.* Indeed, the ADA explicitly limits the obligations it imposes to modifications that do not fundamentally alter programs, 42 U.S.C. § 12182(b)(2)(A)(ii). This Title III provision is equally applicable to Title II. *See Kinney v. Yerusalim*, 9 F.3d 1067, 1073 n.6 (3d Cir. 1993).

The court of appeals asserted that its holding does not require an impermissible "fundamental alteration" of the attendant care program, reasoning that the nature of the services Idell S. would receive under attendant care (e.g., cooking, dressing, bathing) would remain essentially the same as those provided in the nursing home (App. A-21–A-22). The court of appeals ignored the fact that general application of its holding will lead to the closing, in Pennsylvania and other states, of many nursing homes and other institutions, a change previously deemed "fundamental" by another circuit. *See Kentucky Ass'n*, 674 F.2d at 585 (citing *Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979)).

Even where a proposed "alteration" would be economically efficient, as the court of appeals concluded it would be here (App. A-23), if it is a "fundamental alteration," it cannot be required. *See Alexander*, 469 U.S. at 308. There is no question *Alexander* is applicable to the ADA because the House Committee on Education and Labor specifically endorsed *Alexander*. *See* H.R. Report No. 101-485 (II) at 84, *reprinted in* 1990 U.S.C.C.A.N. 367. Moreover, the *Williams* court applied *Alexander* to the ADA claim considered there, 609 N.E.2d at 453, and expressly rejected the relevance of efficiency considerations. *Id.* at 455 & n.7.

E. Converting a Capped Social Service Program into an Entitlement Is a "Fundamental Alteration" of the Program.

The court of appeals' decision also requires a "fundamental" change in the fiscal and administrative aspects of the attendant care program. *Alexander* permits the preservation of program "integrity." 469 U.S. at 300. The transformation of an explicitly capped social services program, *see* 62 P.S. §§ 3054(h) and 3055(e) (App. A-48, A-50), into an entitlement, as done here by the court of appeals, is a "fundamental" change that violates program integrity. It is therefore prohibited by *Alexander*.

Moreover, state constitutional law, Pa. Const. Art. III, § 24, does not permit the Secretary of Public Welfare to fund attendant care services by invading another appropriation (e.g., nursing home) merely because attendant care funds are exhausted. *See Adams County v. Department of Public Welfare*, 502 Pa. 47, 463 A.2d 1002 (1983); *Ashborne Schooi v. Department of Education*, 43 Pa. Commw. 593, 403 A.2d 161 (1979). The court of appeals has imposed on the Secretary an obligation under federal law that she can discharge only by violating state law. The legislature, a non-party here, is not bound to resolve the crisis created by the court of appeals' decision. *See Martin v. Wilks*, 490 U.S. 755 (1989) (non-parties not bound by court orders).

The court of appeals was remarkably indifferent to the Secretary's plight (App. A-24–A-25) ("It is not now up to us to invent a funding mechanism"). This indifference is incompatible with a proper regard for principles of federalism, which limit federal intrusion into the operation of state government. *See, e.g., Pennhurst*, 451 U.S. 1 (1981); *Gregory v. Ashcroft*, 501 U.S. 452 (1991)(federal age discrimination statute does not override state constitutional provision regarding retirement age for judges). *See also City of Edmonds v. Oxford House*, ___ U.S. ___, No. 94-23, May 15, 1995 (1995 WL 283468 *4 n.5) (holding that federal fair housing law takes precedence over local zoning ordinance and that this result is compatible with *Gregory*'s reluctance to overturn state constitutional provisions).

F. The Court of Appeals Ignored the Administrative Burden.

The court of appeals ignored the issue of administrative burden that must be considered in the interpretation of anti-discrimination statutes. *Alexander*, 460 U.S. at 298. Granting to all institutionalized disabled persons a colorable claim to deinstitutionalization imposes an enormous administrative burden on public social service agencies and on courts of separating those with valid claims from those with invalid claims. The regulation on which the court of appeals relied adopts a standard of "appropriate[ness]," 28 C.F.R. § 35.130(d), a standard that this Court, in a similar context, has characterized as difficult to understand. *Pennhurst*, 451 U.S. at 24-25 ("It is difficult to know what is meant by providing 'appropriate treatment' in the 'least restrictive' setting").

In *Alexander*, this Court stated:

> [Plaintiffs'] position would in essence require each recipient of federal funds first to evaluate the effect on the handicapped of every proposed action that might touch the interests of the handicapped, and then to consider alternatives for achieving the same objectives with less severe disadvantage to the handicapped.

469 U.S. at 298. This Court then rejected that position as "a wholly unwieldy administrative and adjudicative burden." *Id.* Here, as in *Alexander*, the administrative and adjudicative burden of assessing "appropriateness," in tens of thousands of cases in Pennsylvania, would be "wholly unwieldy." *See* Part III.C., *infra*.

G. Deference to an Agency's Interpretation of Its Own Regulations Is Not Due Here.

Without expressly stating that it was doing so, the court of appeals deferred to the Department of Justice's (DOJ) interpretation of its own regulation at 28 C.F.R. § 35.130(d) (App. A-11, A-13). Although deference to an agency's interpretation of its own regulation is ordinarily justified, *see, e.g., Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144, 150-51 (1991), it is, for two reasons, not justified here.

First, the interpretation is *ad hoc*, and was never adopted by the DOJ prior to this litigation. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate"). Indeed, the DOJ's interpretation proffered in its *amicus* brief is inconsistent with its own regulatory preamble and the Technical Manual, which limit their examples of forbidden segregation to services intended for the general public. *See* 56 Fed. Reg. 35703; Technical Manual at 11-12; *Martin*, 499 U.S. at 157 (inconsistent interpretation by agency deprives interpretation of grounds for deference). *See also Federal Labor Relations Authority v. United States Department of the Navy*, 966 F.2d 747, 762-64 (3d Cir. 1992) (*en banc*) (rejecting agency interpretation adopted in *amicus* brief because it "has no published source").

Second, the DOJ's interpretation of the regulation makes the regulation inconsistent with the "plain meaning" of the statute, which requires deprivation of some service or benefit based on disability as a necessary condition for finding a violation. 42 U.S.C. § 12132. *See Traynor*, 485 U.S. at 548; *Phillips*, 715 F.2d at 368 ("plain meaning" of section 504). *See also Chevron, USA v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (judicial interpretations prevail over the administrative when statute has plain meaning). Prior to the court of appeals' holding, *all* judicial interpretations of 28 C.F.R. § 35.130(d) rejected the construction now espoused by the DOJ, and instead interpreted the regulation consistent with the plain meaning of the statutory language. *Williams*, 609 N.E.2d at 453; *Conner*, 839 F. Supp. at 1358 n.19; and the district court here (App. A-37).

H. The "Plain Statement" Rule.

Even if the court of appeals' interpretation of the ADA could survive application of ordinary tools of statutory construction, it would succumb to the "plain statement" rule. When this Court last considered a federal statutory claim for deinstitutionalization, it found deinstitutionalization to be a "massive obligation" that Congress could not impose on states without doing so explicitly. *Pennhurst*, 451 U.S. at 24. The "plain statement" rule of *Pennhurst* was in the context of a

funding statute, *id.* at 12, but this Court subsequently held that considerations of federalism require that its application extend more broadly, whenever Congress intrudes on a traditional state function. *Gregory*, 501 U.S. at 463. In *Gregory*, this Court found that an age discrimination statute was not plain enough to override the traditional state function of regulating the tenure of state judges. *Id.* at 470. In the instant case, the ADA and its regulations are not plain enough to override the traditional state function of responding to competing needs in making legislative appropriations.

Both of the regulations on which the court of appeals here relied, 28 C.F.R. § 41.51(d) and 28 C.F.R. § 35.130(d), fail the "plain statement" test. Their language is no plainer than the statutory language considered in *Pennhurst*, 451 U.S. at 24 — "appropriate treatment . . . in the setting that is least restrictive," 42 U.S.C. § 6010(1) and (2) — which was not plain enough to impose on states an obligation to deinstitutionalize persons with developmental disabilities. As discussed above, section 41.51(d) is unrelated to the question of deinstitutionalization; indeed, it was not even considered by the four circuit courts that rejected section 504 claims for community care. *See* Part II.C., *supra*. Courts considering deinstitutionalization claims under section 35.130(d) have all rejected them. *See Williams*, 609 N.E.2d at 453; Conner, 839 F. Supp. at 1358 n.19; and the district court (App. A-36). *Cf. Alexander*, 469 U.S. at 307 n.32 (regulations on which plaintiff relied too general to impose burden on the state).

Finally, under this Court's "plain statement" jurisprudence, legislative history is irrelevant, *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989), and therefore cannot compensate for insufficient clarity in the statutory language. The court of appeals erred in relying on legislative history here (App. A-7–A-10, A-13).

III. THE QUESTIONS PRESENTED ARE IMPORTANT.

In addition to being grounded on major legal error, the court of appeals' decision will have systemic effects which will undermine the rational delivery of social services. Although there may be isolated cases where the decision produces a desirable result, its systemic harmful effects overwhelm any beneficial ones. The Secretary favors the development of community alternatives to institutional care, but the court of appeals' decision, for reasons explained below,

makes efforts to develop community services administratively unworkable and fiscally chaotic.

A. Overall Costs for Deinstitutionalization Without Waiting Lists Are Unbearably High.

The court of appeals ruled in favor of a single plaintiff, but the interpretation of the ADA it adopted applies to all institutionalized disabled persons for whom community care would be "appropriate." Proceeding beyond a single plaintiff, deinstitutionalization without waiting lists creates sudden, large increases in demand for community care staff, and for those in need of housing, housing as well. Such increases in demand would raise costs dramatically. *See* R.A. Posner, *Economic Analysis of Law* 546 (3d ed. 1986) ("In the short run, when supply is fixed, [an] increase in demand . . . causes a sharp rise in price").

B. The Result Here Will Also Require Deinstitutionalization of the Mentally Disabled.

The attendant care program at issue here is intended for the physically disabled, but analogous programs exist under Pennsylvania law for the mentally disabled, as well. For example, the Mental Health and Mental Retardation Act of 1966, 50 P.S. §§ 4101 *et seq.*, established "aftercare" — community care for persons released from mental hospitals — as a service to be provided by counties, primarily with state funds. *See* 50 P.S. § 4301(d)(6). For the mentally retarded as well, the state funds community care. *See* 55 Pa. Code § 4300.23(a)(3). Because the ADA is fully applicable to the mentally disabled, 42 U.S.C. § 12102(2), the holding here implies that a waiting list is also impermissible for these services, with rapid mass deinstitutionalization the result. Indeed, within weeks of the court of appeals' denial of rehearing in this case, a federal district court in Alabama applied the court of appeals' decision to the mentally disabled (albeit purporting to distinguish good from bad deinstitutionalization). *See* Order of the District Court in *Wyatt v. Hanan*, C.A. 3195-N, M.D. Ala., March 6, 1995 (App. A-42–A-43).

The ADA was enacted in 1990, after more than a decade of "bad press" for the policy of deinstitutionalization. It is therefore difficult to imagine that Congress intended the ADA to accelerate deinstitu-

tionalization. *Cf.* J.Q. LaFond and M.L. Durham, *Back to the Asylum* 101 (1992) ("Deinstitutionalization is now being described by family members, professionals and the media as a policy that has failed both the mentally ill and society at large").

C. The Administrative and Judicial Burdens of Distinguishing "Appropriate" from "Inappropriate" Community Care Are Astronomical.

If the ADA requires the government to fund all community care declared "appropriate" by doctors, there is nothing to prevent doctors from declaring community care "appropriate" for all. Future plaintiffs will have little difficulty in finding experts who believe deinstitutionalization to be universally "appropriate." *See, e.g., Halderman v. Pennhurst State School and Hospital*, 610 F. Supp. 1221 (E.D. Pa. 1985) (subsequent history omitted). *Cf. Ake v. Oklahoma*, 470 U.S. 68, 81 (1985) ("psychiatrists disagree widely . . . on cure and treatment"); *Youngberg v. Romeo*, 457 U.S. 307, 316-17 n.20 (1982) (mental retardation professionals "disagree strongly" on issues concerning treatment for severely and profoundly retarded persons).

Any institutionalized disabled person whose care is funded by the state could assert, under the holding of the court of appeals, a right to immediate deinstitutionalization. The state then must either capitulate immediately and provide community care, or be prepared to defend in court the denial of immediate community care. The question there will be "appropriate[ness]." *See* 28 C.F.R. § 35.130(d). As a practical matter, "appropriateness" primarily will mean relative cost, because any service provided in an institution can be provided in the community at *some* cost.

The question of relative cost will, in turn, typically be exceedingly difficult to adjudicate. The generalization that community care costs less than institutional care is now routinely rejected by experts. *See* Mitchell *et al.*, *Synthesis of Research on the Costs of Institutional and Community Based Care*, 17 J. Mental Health Admin. 171 (1990). Leading researchers have concluded that "average cost per institutional client is an imprecise and meaningless figure for rational decision-making." *Id.* at 175 (internal quotation marks and citation omitted). Analysis of relative costs in individual cases would require not only doctors and nurses to testify about

what type and amount of specific services are needed, but also accountants to price them, and economists to consider external factors not included by the accountants. The economists would point out, for example, that any lower costs for community care are typically the result not of any inherent efficiency, but rather of the lower wages community care workers receive relative to institutional workers. *See, e.g.*, Schlalock and Fredericks, *Comparative Costs for Institutional Services and Services for Selected Populations in the Community*, 5 Behavioral Residential Treatment 271 (1990).

These issues transcend categories of disability. Experts on community care for the elderly have concluded that "expanded publicly financed community care does not reduce aggregate costs." Mitchell *et al.*, *supra*, at 172 (internal quotation marks and citation omitted). Writing about the mentally ill, the eminent sociologist Christopher Jencks recently observed that "[d]einstitutionalization saves big money only when it is followed by gross neglect." C. Jencks, *The Homeless* 34 (1994). Concerning the mentally retarded, a former president of the American Association on Mental Retardation recently declared himself "reluctant" to rely on cost differentials to justify deinstitutionalization, because the relative cost of institutional versus community care varies so much with the needs of the client. *Future Plight of Retarded Adults Tied to School's Uncertain Fate*, The New York Times, March 13, 1995, pp. A1, B6.

Given the number of disabled persons who reside in institutions nationally, the burden on the states of defending, and the burden on the judiciary of adjudicating, claims brought under the court of appeals' interpretation of the ADA would be overwhelming.[5]

D. Ironically, the Court of Appeals' Holding May Inhibit the Creation of Programs for Community Care.

The court of appeals acknowledged that the ADA imposes no duty to create social services in the first instance (App. A-20). If the

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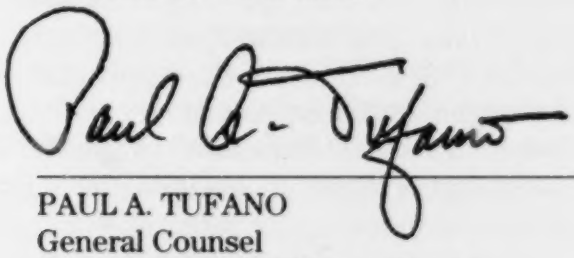
[5]Surveys show that the number of institutionalized disabled persons is as follows: 1,491,000 physically disabled (of whom over 90% have at least one "dependency in activities of daily living"), *The National Nursing Home Survey 1985 Summary*, 25, 38 (DHHS, 1989); 100,000 mentally ill, C. Jencks, *The Homeless*, 25 (1994); 75,000 mentally retarded, The *New York Times*, March 13, 1995, p. B6.

entitlement of Idell S. to attendant care under the court of appeals' decision arises from the *existence* of the attendant care program, and there is a duty to expand existing services to meet demand, the initiation of small-scale (or even medium-scale) community care projects may be precluded. If the existence of a limited program creates an entitlement, the program might not be created at all, an ironic but likely consequence of the court of appeals' misguided decision.

CONCLUSION

For all the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 94-1243

HELEN L., BEVERLY D., FLORENCE H., ILENE F., IDELL S., and AMERICAN DISABLED FOR ATTENDANT PROGRAMS TODAY ("A.D.A.P.T.")

Idell S., Appellant

v.

ALBERT L. DiDARIO, individually and in his official capacity as Superintendent of Norristown State Hospital, and KAREN F. SNIDER, in her capacity as Secretary, Pennsylvania Department of Public Welfare

Karen F. Snider, Appellee

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 92-6054)

Argued September 13, 1994

Before: MANSMANN, COWEN and McKEE,
Circuit Judges

Opinion Filed: January 31, 1995

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1. The United States Department of Justice has filed an Amicus Brief. 42 U.S.C. §12133 charges the Department with enforcement of Title II of the ADA. Pursuant to 42 U.S.C. 12134(a) and 42 U.S.C. 12206(c)(3), the Department has issued regulations and a Technical Assistance Manual interpreting Title II. See 28 C.F.R. part 35 (1993); The Americans with Disabilities Act Title II Technical Assistance Manual (1993).

OPINION OF THE COURT

McKEE, *Circuit Judge:*

We are asked to decide if the Pennsylvania Department of Public Welfare ("DPW")[2] is violating Title II of the Americans with Disabilities Act (the "ADA" or the "Act"), 42 U.S.C. § 12132, by the manner in which it operates its attendant care and nursing home programs. Idell S. alleges that DPW is violating the ADA by requiring that she receive required care services in the segregated setting of a nursing home rather than through DPW's attendant care program. That program would allow her to receive those services in her own home where she could reside with her children. The district court ruled that DPW is not violating the ADA because it is not discriminating against Idell S. For the reasons that follow we will reverse.

I.

In January of 1994, Idell S. filed an uncontested motion to join a lawsuit which had previously been filed by Beverly D., and Ilene F., who were also nursing home residents.[3]

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2. Although Karen F. Snider is the named defendant in this lawsuit, she was sued in her capacity as the Secretary of the Pennsylvania Department of Public Welfare. We will, therefore, refer to the defendant as the Department of Public Welfare ("DPW"), rather than Snider.

3. Helen L., the original plaintiff in this law suit, was a patient at Norristown State Hospital when her suit was filed. She asserted a constitutional claim against Albert DiDario (the Superintendent of that facility) for alleged violations of her Fourteenth Amendment rights for failing to place her in an appropriate community setting and for unnecessarily maintaining her in Norristown State Hospital. Although she alleged a claim under the ADA, she has since been discharged from Norristown State Hospital and thereafter pursed only a claim for damages for the alleged violation of her constitutional rights. Memorandum Opinion, at 15-6.

In November of 1992, Beverly D. and Ilene F., joined Helen L.'s law suit and an Amended Complaint was filed asserting a claim on their behalf against Karen F. Snider, as the Secretary of the Pennsylvania

The suit alleged that DPW had violated Title II of the ADA by providing services in a nursing home rather than in the "most integrated setting appropriate" to the plaintiffs' needs, and sought declaratory and injunctive relief.

Thereafter, Beverly D. and Ilene F. filed for an uncontested voluntary dismissal of their claim because they had been discharged from the nursing home. At the same time, Idell S. moved for summary judgment based upon an Amended Stipulation of Facts. Prior to ruling on the joinder and voluntary dismissal motions, the district court issued a Memorandum and Order dated January 27, 1994, granting summary judgment against Beverly D. and Ilene F. and in favor of DPW. On February 2, 1994, the district court issued an Order dismissing Beverly D. and Eileen F. as plaintiffs and adding Idell S. as a plaintiff. The court also ruled that "[f]or the reasons stated in the Memorandum filed January 27, 1994, the motion for summary judgment of Idell S. is denied and judgment is entered in favor of defendants and against . . . Idell S. . . . ."

Idell S. then filed this appeal.[4]

Department of Public Welfare. In April of 1993, they filed a motion for a preliminary injunction on their ADA claim. After the parties agreed to a Stipulation of Facts, the motion for preliminary injunction was converted to one for summary judgment, and DPW filed a cross-motion for summary judgment.

4. In the same Memorandum and Order which denied Idell S.'s motion for summary judgment, the district court denied a motion for summary judgment filed by DiDario and DiDario appealed. DiDario's appeal did not involve any questions of law or fact in common with Idell S.'s appeal. On May 13, 1994, we entered an Order dismissing DiDario's appeal for lack of appellate jurisdiction because the district court Order appealed from was not a final order.

Following the issuance of the February 2, 1994 Order granting summary judgment in favor of Snider and against Idell S., the district court issued a Rule 54(b) Certification and Order on February 8, 1994, directing the Clerk to enter final judgment in favor of defendant Snider against Idell S. Because Idell S.'s sole claim was disposed of, the certification creates a final judgment subject to appeal pursuant to 28 U.S.C. §1291. *See, Tilden Financial Corp. v. Palo Tire Service*, 596 F.2d 604, 607 (3d Cir. 1979).

Plaintiffs Florence H. and ADAPT were not parties to the summary judgment motions in the district court. ADAPT's motion for voluntary dismissal was granted by the district court on February 18, 1994.

II.

Idell S. is 43 years old and the mother of two children ages 22 and 14.[5] In 1973 she contracted meningitis which left her paralyzed from the waist down and greatly reduced her ability to care for herself. As a result, she has been a patient at the Philadelphia Nursing Home since December 26, 1989. Idell S. uses a wheelchair for locomotion and requires assistance with certain activities of daily living including bathing, laundry, shopping, getting in and out of bed, and house cleaning. She is able to cook, dress herself (except for her shoes and socks), attend to her personal hygiene (using a transfer board to access the toilet) and to her grooming. The parties agree that, although Idell S. is not capable of fully independent living, she is not so incapacitated that she needs the custodial care of a nursing home.

DPW operates two different programs that provide physically disabled persons with assistance in daily living. DPW funds nursing home residence through the Medical Assistance program ("Medicaid"), and it operates an "attendant care program" under 62 Pa. Cons. Stat. Ann. §§ 3051-3055 (the "Care Act"). The attendant care program provides "[t]hose basic and ancillary services which enable an individual [with physical disabilities] to live in his[/her] home and community rather than in an institution and to carry out functions of daily living, self care and mobility." 62 Pa. Cons. Stat. Ann. §§ 3052, 3054. DPW's average cost of caring for a person in a nursing home is $45,000 per year. The Commonwealth pays 44% of this amount ($19,800) and the difference ($24,200) is paid by the federal government. DPW's average cost of caring for a person in the attendant care program is $10,500 per year. That amount is totally borne by the Commonwealth.

Homemaker Service of the Metropolitan Area, Inc. ("HSMA") contracts with DPW to operate an attendant care program. "The [s]ervice [provided by HSMA] consists of those basic and ancillary services which enable eligible

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5. The essential facts surrounding this controversy are not in dispute. They are contained in an Amended Stipulation of Facts submitted to the district court in January of 1994.

individuals to live in their own homes and communities rather than in institutions and to carry out functions of daily living, self-care and mobility. "Amended Stipulation of Facts, ¶ 35. The program thus allows eligible individuals: "1. [t]o live in the least restrictive environment as independently as possible; 2. [t]o remain in their homes and to prevent their inappropriate institutionalization. . . ." *Id.* at ¶36.

In 1993, HSMA evaluated Idell S. and determined that she was eligible for attendant care services. However, because of a lack of funding, she was placed on a waiting list for that program and continues living in a nursing home, separated from her children. The parties agree that if Idell S. were enrolled in the attendant care program, nursing home care would be inappropriate.[6] Except for access to skilled nursing care which she neither needs nor wants, Idell S. receives the same kind of services in the nursing home that the attendant care program would provide. "DPW has not applied for reimbursement under the Medical Assistance statute for personal care/attendant care services in the community," Amended Stipulation of Facts ¶41, nor has it "requested Medical Assistance dollars be available for Attendant Care Services in the Community." *Id.* at ¶37. Consequently, the Commonwealth continues to spend approximately $45,000 a year to keep Idell S. confined in a nursing home rather then spend considerably less to provide her with appropriate care in her own home.

Because she is required to receive services in a nursing home, Idell S. has no contacts with non-disabled persons other than the staff of the nursing home and visits from her two children. Idell S. claims that this violates Title II of the ADA.

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6. The parties have stipulated that "[t]he setting for the provision of attendant care services appropriate to the needs of Idell S. is in the community." Amended Stipulation of Facts ¶29. The parties further agree that "[w]ith attendant care services in the community, nursing home care would not be appropriate for Idell S." *Id.*, at ¶32.

III.

The standard of review applicable to a grant of summary judgment is plenary. *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1297 (3d Cir. 1993). "On review, the appellate court is required to apply the same test the district court should have utilized initially." *Goodman v. Mead Johnson & Co.*, 535 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). A motion for summary judgment shall be granted if the court determines "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The district court's interpretation of a federal regulation is a question of law subject to plenary review. *ADAPT v. Skinner*, 881 F.2d 1184, 1191 n. 6 (3d Cir. 1989).

The district court ruled that Idell S. was

> [d]enied attendant care services because of a lack of funds. [The record] does not demonstrate that [she has] been denied funding for attendant care services because [she] is disabled. [Her] failure to show that [she] has been excluded from the attendant care services program on the basis of [her] disability is fatal to [her] claim.

Memorandum Opinion at 11. We disagree.

A.

In order to appreciate the scope of the ADA and its attendant regulations, it is necessary to examine the circumstances leading to its enactment. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, was the first broad federal statute aimed at eradicating discrimination against individuals with disabilities.[7] "Section 504 of the

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7. The law developed under section 504 of the Rehabilitation Act is applicable to Title II of the ADA. *See, Easley v. Snider*, 36 F.3d 297 (3d. Cir. 1994). *See also*, 28 C.F.R. § 35.103 ("[T]his part [applying to the ADA] shall not be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 791)").

Rehabilitation Act of 1973, [is] commonly known as the civil rights bill of the disabled." *ADAPT v. Skinner*, 881 F.2d at 1187. Section 504 now reads in relevant part:

> No otherwise qualified individual with a disability. . .shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

29 U.S.C. §794 (Supp. 1994).[8] Section 504's sponsors described it as a response to " 'previous societal neglect' " and introduced it to rectify "the country's 'shameful oversights' which caused the handicapped to live among society 'shunted aside, hidden and ignored.' " *Alexander v. Choate*, 469 U.S. 287, 296 (1985).

On April 26, 1976 then-President Gerald Ford signed Executive Order No. 11914, 3 C.F.R. 117 (1977), which authorized the Department of Health, Education and Welfare to coordinate enforcement of section 504 and which required the Secretary of HEW to promulgate regulations for enforcement.[9] Subsequently, HEW's section 504

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8. The general prohibition against disability-based discrimination contained in §504 was first proposed in the 92nd Congress as an amendment to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.* Although it was ultimately enacted by the 93rd Congress as part of a pending Vocational Rehabilitation Act, its language was patterned after other civil rights statutes. *Alexander v. Choate*, 469 U.S. 287, 296 n. 13 (1985). The language of section 504 is virtually identical to that of section 601 of Title VI of the Civil Rights Act of 1964 that bars discrimination based upon race, color or national origin in federally-assisted programs. *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 626 (1984).

As originally enacted, section 504 referred to a "handicapped" individual being discriminated against solely by reason of a "handicap". The change in nomenclature from "handicap" to "disability" reflects Congress' awareness that individuals with disabilities find the term "handicapped" objectionable. Burgdorf, *The Americans with Disabilities Act: Analysis and Implication of a Second-Generation Civil Rights Statute*, 26 Harv. C.R. - C.L. L.Rev. 413, 522 n. 7 (1991).

9. The Rehabilitation Act did not mandate that any regulations be promulgated. Accordingly the Department of Health, Education and Welfare (now the Department of Health and Human Services), did not promulgate any regulations to implement that Act. *Southeastern Community College v. Davis*, 442 U.S. 397, 404 n. 4 (1979).

rulemaking and enforcement authority was transferred to the Department of Health and Human Services ("HHS"). *See* 20 U.S.C. § 3508.

On November 2, 1980, President Carter signed Executive Order No. 12250, 45 Fed. Reg. 72995, entitled "Leadership and Coordination of Nondiscrimination Laws". That Executive Order transferred HHS's coordination and enforcement authority to the Attorney General. Section 1-105 of that Executive Order provided that the HHS guidelines "shall be deemed to have been issued by the Attorney General pursuant to this Order and shall continue in effect until revoked or modified by the Attorney General." Thereafter, the Department of Justice adopted the HHS coordination and enforcement regulations and transferred them from 45 C.F.R. part 84 to 28 C.F.R. part 41, 46 Fed. Reg. 40686. (the "coordination regulations.") The section 504 coordination regulations begin by stating that the purpose of 28 C.F.R. part 41 is to "implement Executive Order 12250, which requires the Department of Justice to coordinate the implementation of section 504 of the Rehabilitation Act of 1973." 28 C.F.R. § 41.1. A subsequent section requires all federal agencies to issue regulations "to implement section 504 with respect to programs and activities to which it provides assistance." 28 C.F.R. § 41.4. The coordination regulations contain a separate section which lists a number of general prohibitions against disability-based discrimination. 28 C.F.R. § 41.51. That section mandates that all recipients of federal financial assistance "shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. § 41.51(d).

Although Section 504 has been called "the cornerstone of the civil rights movement of the mobility-impaired", *ADAPT v. Skinner*, 881 F.2d at 1205 (3d Cir. 1989) (concurring opinion), its shortcomings and deficiencies quickly became apparent. *See, e.g.*, Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 394-408 (1991) (The Rehabilitation Act and its regulations have been practically a dead letter as a remedy for segregated public services). One commentator has written that the weaknesses of section 504 arise from its statutory language,[10] the limited extent of its coverage, inadequate enforcement

10. We have also noted that section 504 "is both ambiguous and lacking in specifics." *Disabled in Action of Pennsylvania v.Sykes*, 833 F.2d 1113, 1117 (3d Cir. 1987), *cert. denied*. ___ U.S. ___, 108 S.Ct. 1293 (1988).

mechanisms and erratic judicial interpretations. Burgdorf, *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 Harv. C.R. - C.L. L. Rev. 413, 431 (1991).

Toward the end of the 1980's the United States Senate and the House of Representatives both recognized that then current laws were "inadequate" to combat "the pervasive problems of discrimination that people with disabilities are facing." S. Rep. No. 116, 101st Cong., 1st Sess. 18 (1989); H.R. Rep. No. 485 (II), 101st Cong., 2d Sess. 47 (1990). The Senate recognized the need for "omnibus civil rights legislation" for the disabled. S. Rep. No. 116, 101st Cong., 1st Sess. 19 (1989). Similarly, the House addressed the need for legislation that "will finally set in place the necessary civil rights protections for people with disabilities." H. R. Rep. No. 485 (II), 101st Cong., 2d Sess. 40 (1990). Both branches of Congress concluded:

> [T]here is a compelling need to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities *and for the integration of persons with disabilities into the economic and social mainstream* of American life. Further, there is a need to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.

S. Rep. No. 116, 20; H. R. Rep. No. 485 (II), 50 (emphasis added). It was against this backdrop that the ADA was enacted.[11]

B.

Title II of the ADA, 42 U.S.C. §§ 12131-12134, incorporates the "non-discrimination principles" of section 504 of the Rehabilitation Act[12] and extends them to state and local governments. *Easley v. Snider*, 36 F.3d 297, 300 (3d Cir. 1994). Section 202 of Title II provides:

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11. For a concise history of the ADA's "tortuous legislative journey", see Jones, *Overview and Essential Requirements of the Americans with Disabilities Act*, 64 Temp. L. Rev. 471, 472-475 (1991).

12. *See* 28 C.F.R. § 28.103.

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. The Act directs the Attorney General to promulgate regulations necessary to implement Title II. *See* 42 U.S.C. § 12134(a). The Act further commands that those regulations "be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations . . . applicable . . . [under § 504 of the Rehabilitation Act of 1973]." 42 U.S.C. § 12134(b). Accordingly, the regulations that the Department of Justice promulgated under Title II are patterned after the section 504 coordination regulations.

Because Title II was enacted with broad language and directed the Department of Justice to promulgate regulations as set forth above, the regulations which the Department promulgated are entitled to substantial deference. *Blum v. Bacon*, 457 U.S. 132, 141 (1982). ("[T]he interpretation of [the] agency charged with the administration of [this] statute is entitled to substantial deference.") "[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). Unless the regulations are "arbitrary, capricious or manifestly contrary to the statute", the agency's regulations are "given controlling weight". *Chevron, U.S.A., Inc.*, 467 U.S. at 844.

Moreover, because Congress mandated that the ADA regulations be patterned after the section 504 coordination regulations, the former regulations have the force of law. When Congress re-enacts a statute and voices its approval of an administrative interpretation of that statute, that interpretation acquires the force of law and courts are bound by the regulation. *United States v. Board of Comm'rs of Sheffield, Alabama*, 435 U.S. 110, 134 (1978). The same is true when Congress agrees with an administrative interpretation of a statute which Congress is re-enacting. *See Don E. Williams Co. v. Commissioner*, 429 U.S. 569,

574-577 (1977). Although Title II of the ADA is not a re-enactment of section 504, it does extend section 504's anti-discrimination principles to public entities. Furthermore, the legislative history of the ADA shows that Congress agreed with the coordination regulations promulgated under section 504. *See, e.g.*, S. Rep. No. 116, 101st Cong., 1st Sess. 44 (1989) ("The first purpose of [Title II] is to make applicable the prohibition against discrimination on the basis of disability, currently set out in regulations implementing section 504 of the Rehabilitation Act of 1973, to. . . state and local governments. . . . "); H.R. Rep. No. 485 (III), 101st Cong., 2d. Sess. 50. ("The general prohibitions set forth in the section 504 regulations are applicable to all programs and activities in Title II").

Idell S.'s challenge to DPW's treatment of her is based upon 28 C.F.R. § 35.130(d). That ADA regulation states that: "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." This regulation is almost identical to the section 504 integration regulation which has been in effect since 1981. *See* 28 C.F.R. § 41.51(d) (1981).[13] As Congress has voiced its approval of that coordination regulation, 28 C.F.R. § 130.35(d) has the force of law.

C.

In enacting the ADA, Congress found that "[h]istorically, society has tended to isolate and segregate individuals with disabilities, and. . .*such forms of discrimination*. . .continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2) (emphasis added). Congress also concluded that "[i]ndividuals with disabilities continually encounter *various forms of discrimination, including. . . segregation*. . . .", 42 U.S.C. §12101(a)(5) (emphasis added). The House Report on the ADA noted that: "Unlike the other titles in this Act, title II does not list *all of the forms of discrimination that the title is intended to prohibit.*

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13. The section 504 integration regulation had been in effect for 8 years when, in 1989, the 101st Congress began holding hearings on the proposed ADA.

Therefore, the purpose of [section 204] is to direct the Attorney General to issue regulations *setting forth the forms of discrimination prohibited.*" H.R. Rep. No. 485 (III), 101st Cong., 2d Sess., 52 (1990) (emphasis added).

In furtherance of the objective of eliminating discrimination against the disabled, Congress stated that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, *full participation*, *independent living*, and economic self-sufficiency for such individuals[.]" 42 U.S.C. §12101(a)(8) (emphasis added). Similarly, in response to its mandate, the Department of Justice stated "[i]ntegration is fundamental to the purposes of the Americans with Disabilities Act." 28 C.F.R. Part 35, App. A. §35.130.[14] Accordingly, the integration mandate of §35.130(d) is contained under 28 C.F.R. §35.130 which is entitled "[g]eneral prohibitions against *discrimination*."

Thus, the ADA and its attendant regulations clearly define unnecessary segregation as a form of illegal discrimination against the disabled.[15] Accordingly, the district court erred in holding that the applicable provisions of the ADA "may not be invoked unless there is first a finding of discrimination." Memorandum Opinion at 12.

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14. We note that this is consistent with the Fair Housing Act of 1988, 52 U.S.C. §3604(f), another predecessor of the ADA. In enacting that act, the House Judiciary Committee stated "[t]he Fair Housing Amendments Act, like Section 504 of the Rehabilitation Act of 1973, as amended, is a clear pronouncement of a national commitment to *end the unnecessary exclusion of persons with handicaps* from the American mainstream." H. Rep. No. 711, 100th Cong., 2d Sess., 18 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179 (emphasis added; footnote omitted).

15. Even if it could be argued that the Act and its regulations are ambiguous on this point, the heading of the regulation at issue here, and the legislative history of the ADA confirm that Congress intended to define unnecessary segregation of the disabled as a form of illegal discrimination. *See Crandon v. United States*, 494 U.S. 152, 158 (1990) (Where there is ambiguity "[i]n determining the meaning of [a] statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy."); *See also INS v. Center for Immigrants' Rights*, ___ U.S. ___, 112 S. Ct. 551, 556 (1991) (the title of a regulation or section is relevant to its interpretation).

D.

In reaching its conclusion, the district court relied in large part upon *Williams v. Secretary of the Executive Office of Human Services*, 609 N.E.2d 447 (Ma. 1993).[16] In *Williams*, the Massachusetts Supreme Court held, *inter alia*, that the ADA does not require a specific proportion of that state's mental health service placements to be in integrated housing. The court stated:

> The focus of Federal disability discrimination statutes is to address discrimination in relation to nondisabled persons, rather than to eliminate all differences in levels or proportions of resources allocated and services provided to individuals with differing types of disabilities. In other words, the purpose of the ADA is to provide an equal opportunity for disabled citizens.

Williams, 609 N.E.2d at 559. (citations omitted).

We are not persuaded by the analysis in *Williams*. That court based its decision in part upon our own decision in *Clark v. Cohen* 794 F.2d 79 (3rd Cir. 1986), *cert denied*, 479 U.S. 962 (1986) and the Supreme Court's decision in *Alexander v. Choate*, *supra*. Our holding in *Clark* is not based upon the ADA nor section 504, but upon the Due Process Clause of the Fourteenth Amendment. There, a forty-five year old, mentally retarded woman had been committed to a state-run mental institution since she was fifteen years old. She filed a complaint against the Commonwealth of Pennsylvania and the County of Philadelphia alleging various Constitutional violations as well as a violation of section 504 of the Rehabilitation Act. She alleged that her confinement was illegal and sought placement in a community-living arrangement supervised

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16. The district court also cited *Pinnock v. International House of Pancakes*, 844 F.Supp. 574, 582-3 (S.D. Ca. 1993), to support its ruling that 28 C.F.R. § 130(d) is not applicable unless there is a specific finding of discrimination. *Id.* at 12. However, *Pinnock* concerned an action under Title III of the ADA (public accommodations) and the discussion cited in the district court's opinion dealt with the Title III integration regulation which the *Pinnock* court held is "intended to prevent segregation based on fears and stereotypes about persons with disabilities." *Id.* Idell S.'s suit does not implicate Title III.

by the County of Philadelphia. Clark based her Rehabilitation Act claim upon the fact that the Commonwealth was providing community living arrangements to persons with disabilities similar to hers while requiring her to remain in an institution.

The district court ruled that Clark had not established disability-based discrimination, but ruled that her confinement was unconstitutional.[17] 619 F. Supp. at 696-705. In affirming the district court's judgment we stated "[s]ection 504 prohibits discrimination against the handicapped in federally funded programs[,] [i]t imposes no affirmative obligations on the states to furnish services." *Clark v. Cohen*, 794 F. 2d at 85, n.3. However, we were not there concerned with the integration mandate of the ADA or the Rehabilitation Act. Plaintiff in *Clark* relied primarily upon section 504 and 45 C.F.R. §§ 84.4(b)(1)(i)-(iv). The prohibitions contained in the later regulations are under a regulation which states "Discriminatory actions prohibited." 45 U.S.C. § 84.4(b). That regulation does not state that the actions set forth are prohibited per se. Rather, it states that recipients of federal funds may not engage in the enumerated acts "on the basis of handicap." 45 U.S.C §84.4(b)(1). Thus, the section 504 inquiry in *Clark* had to include a determination of the basis for the allegedly discriminatory actions. The language of 28 C.F.R. § 35.130(d) is very different.

In addition, we note that the court in *Williams* was troubled by difficulties of proof that are not present here. The plaintiffs in *Williams* had attempted to use a statistical analysis to establish that disabled persons were more likely to be adversely affected by the state's policy than non-disabled persons. The court rejected that proof stating:

> The plaintiffs use of a system-wide percentage of DMH clients . . . ignores the fact that the ADA does not mandate particular system-wide percentages for allocations of community placements. Further, the

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17. Clark had been continuously confined even though the responsible professionals at the institution admitted that her condition did not warrant confinement, and her case had never been reviewed by anyone with authority to release her.

> plaintiffs' figures did not show that any particular client's placement was inappropriate, or that they themselves were inappropriately placed in a segregated setting. . . A mere percentage, standing alone, does not establish a presumption of inappropriate placement.

Id., at 414 Mass. 551, 557-8, 609 N.E.2d. 447, 453. We encounter no such problem as the parties have stipulated that Idell S.'s placement would be inappropriate if there was an opening in the attendant care program.[18]

The court in *Williams* was also troubled by pragmatic concerns of granting relief. The court stated that "any interpretation of the ADA must consider the same practicalities that the United States Supreme Court acknowledged in its examination of the Federal Rehabilitation Act. *See, e.g. Alexander v. Choate*, . . . ". *Id.* at 557, 453 (citations omitted). *Choate* did not involve 28 C.F.R. § 35.130(d). The claim there was based upon plaintiffs' assertion that Tennessee's planned cutbacks in Medicaid reimbursement for in-patient hospital stays would disproportionately disadvantage handicapped persons in violation of section 504. However, to the extent that *Choate* is relevant to our analysis, it supports our holding that Congress did not intend to condition the protection of the ADA upon a finding of "discrimination."

In *Choate*, the Supreme Court emphasized the factors which led to enactment of section 504.

> Discrimination against the handicapped was perceived by Congress to be most often the product, *not of invidious animus, but rather of thoughtfulness and indifference — of benign neglect.* Thus, Representative Vanik, introducing the predecessor to § 504 in the House described the treatment of the handicapped as one of the country's 'shameful oversights' which caused the handicapped to live among society '*shunted aside*,

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18. The precise question raised by Idell S. has not previously been decided by an appellate court. Similarly, the cases from other circuits that DPW relies upon to support its assertion that neither §504 nor Title II of the ADA require community care were not decided on the basis of 28 C.F.R. § 35.130(d). Brief of Appellee, at 10-11.

> *hidden*, and *ignored*.' Similarly, Senator Humphrey . . . asserted that, 'we can no longer tolerate the *invisibility* of the handicapped in America. . . .' And Senator Cranston . . . described the Act as a response to 'previous societal neglect' . . . Federal agencies and commentators on the plight of the handicapped similarly have found that *discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus.*

469 U.S. at 295 (emphasis added) (citations and footnotes omitted).[19]

Because the ADA evolved from an attempt to remedy the effects of "benign neglect" resulting from the "invisibility" of the disabled, Congress could not have intended to limit the Act's protections and prohibitions to circumstances involving deliberate discrimination. Such discrimination arises from "affirmative animus" which was not the focus of the ADA or section 504. The Supreme Court elaborates upon this distinction noting that, although discrimination against the disabled normally results from "thoughtfulness" and "indifference," not "invidious animus", such "animus" did exist. 469 U.S. at 295 at n.12. ("To be sure, well-cataloged instances of invidious discrimination against the handicapped do exist"). However, that was not the focus of section 504, or the ADA. Rather, the ADA attempts to eliminate the effects of that "benign neglect," "apathy," and "indifference." The 504 coordination regulations, and the ADA "make clear that the unnecessary segregation of individuals with disabilities in the provision of public services is itself a form of discrimination within the meaning of those statutes, independent of the discrimination that arises when individuals with disabilities receive different services than those provided to individuals without disabilities." Brief of Amicus at 7.

The ADA is intended to insure that qualified individuals receive services in a manner consistent with basic human

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19. The court ruled that the challenged cutbacks were neutral on their face and that, therefore, plaintiffs could not recover. However, the court noted that a plaintiff need not establish that there has been an intent to discriminate in order to prevail under section 504. 469 U.S. at 295-297.

dignity rather than a manner which shunts them aside, hides, and ignores them.[20] "[M]uch of the conduct that Congress sought to alter in passing the Rehabilitation Act [and the ADA] would be difficult if not impossible to reach were the Act[s] construed to proscribe only conduct fueled by a discriminatory intent." *Alexander v. Choate*, 469 U.S. at 296-7. Thus, we will not eviscerate the ADA by conditioning its protections upon a finding of intentional or overt "discrimination."

IV.

DPW quotes *Traynor v. Turnage*, 485 U.S. 535, 548 (1988) to argue that there can be no improper discrimination here because the services at issue are only provided to persons with disabilities. *See* Brief of Appellee at 25-6. However, *Traynor* is easily distinguished. *Traynor* concerned the legality of 38 U.S.C.A. § 1662 which allowed for an extension of time to use veteran's benefits if a disability precluded the veteran from using the benefits within the time frame established by law. However, the veteran only qualified if he/she could establish "a physical or mental disorder which was not the result of [his/her] own willful misconduct." *Id.* at 535. Traynor was an honorably discharged veteran who suffered from alcoholism unrelated to any psychiatric disorder. Under applicable V.A. regulations, such alcoholism was defined as "willful misconduct" thus precluding him from relying upon his "disorder" to enlarge the period of time that he could use his benefits. Traynor challenged this limitation on behalf of himself, and other similarly situated veterans.

In denying the claim, the court noted that section 504 had been part of the amendments to the Rehabilitation Act which were passed in 1978 and which extended the scope of that legislation to "any program or activity conducted by any Executive Agency." *Id.* at 547. The court noted that

> petitioners can prevail under the Rehabilitation Act claim only if the 1978 legislation can be deemed to

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20. However, as discussed *infra*, the Act does not require fundamental changes in the nature of a service or program.

> have implicitly repealed the willful misconduct provision of the 1977 legislation or forbade the Veterans' Administration to classify primary alcoholism as willful misconduct. They must thereby overcome the cardinal rule. . . that repeals by implication are not favored.

Id. (citations and internal quotes omitted). The court reasoned that it was not at liberty to assume that the subsequent enactment of the Rehabilitation Act implicitly repealed the prior act unless "such a construction is absolutely necessary . . . in order that [the] words [of the latter statute] shall have any meaning at all." *Id.* (brackets in original). These two enactments were "capable of co-existence" as the "willful misconduct" provision did not undermine the central purpose of section 504. That purpose was to "assure that handicapped individuals receive 'evenhanded treatment' in relation to nonhandicapped individuals." *Id.* at 548 (citing *Alexander v. Choate*).

The court then noted that the program at issue did not treat handicapped persons less favorably than nonhandicapped persons as only handicapped persons could apply for an extension of time. "In other words § 1662(a)(1) merely provides a special benefit to disabled veterans who bear no responsibility for their disabilities that is not provided to other disabled veterans or to any able-bodied veterans." *Id.* The court then stated "[t]here is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons." *Id.* However, the court was not concerned with the application of the integration mandate, or anything analogous to it, and the holding is not germane to our analysis. As noted above, Congress has stated that "discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization." 42 U.S.C. §12101 (3). If Congress were only concerned about disparate treatment of the disabled as compared to their nondisabled counterparts, this statement would be a non sequitur as only disabled persons are institutionalized.

DPW also relies upon *Johnson v. Thompson*, 971 F.2d 1487, 1494 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 1255 (1993). ("[W]here the handicapping condition is related to the condition(s) being treated, it will rarely, if ever, be possible to say. . . that a particular decision was 'discriminatory' ") (citation omitted)). *See* Brief of Appellee at 7. *Johnson* is also inapposite. There, the court was asked to hold that different levels of medical treatment given to differently classified infants affected with spina bifida violated section 504. The case did not involve any claim that the integration mandate of 504 or the ADA had been violated.[21]

DPW also attempts to defeat Idell S.'s claim by labelling it a claim for "community care" or "deinstitutionalization" — something which the ADA does not require.[22] *See* Brief of Appellee at 10. Idell S. is not asserting a right to community care or deinstitutionalization per se. She properly concedes that DPW is under no obligation to provide her with any care at all. She is merely claiming that, since she qualifies for DPW's attendant care program, DPW's failure to provide those services in the "most integrated setting appropriate" to her needs (without a proper justification) violates the ADA.

V.

DPW's obligation to provide appropriately integrated services is not absolute as the ADA does not require that DPW make fundamental alterations in its program.

> A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would

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21. *See Martin v. Voinovich*, 840 F. Supp. 1175, 1191-92 (S.D. Ohio 1993) (Under §504 and the ADA, discrimination between people with different disabilities may be actionable).

22. *See Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 24 (1981) (deinstitutionalization involves "massive" changes in a state's programs and is not required absent a clear statutory command).

> fundamentally alter the nature of the service, program, or activity.

28 C.F.R. § 35.130(b)(7). In *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), and *Alexander v. Choate*, *supra*, the Supreme Court attempted to define the limits of the requirements under the ADA.

In *Southeastern*, Southeastern Community College refused to admit an applicant to its nursing school program because of her hearing impairment. The college argued that a registered nurse had to meet certain physical requirements, and asserted that Davis' disability compromised her ability to effectively participate in critical training programs and safely care for patients. Davis countered that section 504 required that the school take certain measures to allow her to enjoy the benefits of the nursing program. The Court disagreed and held that section 504 imposes no obligation to engage in "affirmative action." *Id.* at 411. In *Choate*, the Court explained that "affirmative action" as used in *Davis* "[r]eferred to those 'changes,' 'adjustments,' or 'modifications' to existing programs that would be 'substantial' or that would constitute 'fundamental alteration[s]' in the nature of a program . . .,' rather than to those changes that would be reasonable accommodations." (citations omitted). *Id.* at 300 n. 20.

> In attempting to discern what is required by the language of section 504, we must view it in light of two countervailing legislative concerns: (1) effectuation of the statutes objectives of assisting the handicapped; and (2) the need to impose reasonable boundaries in accomplishing this legislative purpose. See *Alexander v. Choate*.

ADAPT v. Skinner, 881 F.2d at 1191. "The test to determine the reasonableness of a modification is whether it alters the essential nature of the program or imposes an undue burden or hardship in light of the overall program." *Easely v. Snider*, 36 F.3d at 305.

Here, DPW agrees that "the most integrated setting appropriate to [Idell S.]" is her home but argues that it cannot comply with Idell S.'s request for the "most

integrated services appropriate" absent a fundamental alteration of its program. Brief of Appellee, at 13-17. The only explanation DPW has offered for this position is its assertion that funding for nursing home and attendant care for fiscal year 1993-1994 has already been appropriated by the General Assembly of Pennsylvania and that it cannot, under state constitutional law, shift funds from the nursing care appropriation to attendant care. Brief of Appellee, at 14-15. However, Idell S. is not asking that DPW alter its requirements for admission to the program, nor is she requesting that the substance of the program be altered to accommodate her.[23] Even if we assume that DPW cannot (or will not) cause the necessary shift of funds under its current procedures and practices, it is clear from this record that providing attendant care services to Idell S. in her home would not be a fundamental alteration of the attendant care program or the nursing home program.

As previously noted, DPW administers its attendant care program under the Care Act, 62 Pa. Stat. Ann. § 3052 *et seq.* (1994). That Act states:

> The General Assembly declares it is the policy of this Commonwealth that:
>
> (1) The increased availability of attendant care services for adults will enable them to live in their own homes and communities.
>
> (2) Priority recipients of attendant care services under this act shall be those mentally alert but severely physically disabled who are in the greatest risk of being in an institutional setting.

We have previously noted that the attendant care program

> enables physically disabled persons to "better control their lives and reach maximum independence when they are able to direct their own personal care and

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23. *See Easley v. Snider, supra* (The ADA does not require that the Commonwealth extend its attendant care services to physically disabled individuals who were not mentally alert as doing so would result in an unreasonable modification of the program).

> manage their home, business, and social lives. Attendant [c]are in Pennsylvania continues to be seen as part of the wider independent living movement whose fundamental goals are to enable the physically disabled to: a) maintain a less restrictive and/or independent living arrangement; b) maintain employment; and/or c) remain in their homes."

Easley, 36 F.3d at 304. This is remarkably similar to the policy and purpose of the ADA in general, and 28 C.F.R. § 35.130(d) in particular. We fail to see how compliance with 28 C.F.R. § 35.130(d) requires DPW to fundamentally alter its attendant care program. Nor do we perceive how the requested moderation would place an undue burden on DPW. On the contrary, the relief that Idell S. is requesting merely requires DPW to fulfill its own obligations under state law. This is not "unreasonable."

> As with Section 504 of the Rehabilitation Act, integrated services are essential to accomplishing the purposes of title II [of the ADA]. As stated by Judge Mansmann in *Adapt v. Skinner*, the goal [is to] eradicate the "invisibility of the handicapped' " . . . [s]eparate-but-equal services do not accomplish this central goal and should be rejected.
>
> *The fact that it is more convenient, either administratively or fiscally, to provide services in a segregated manner, does not constitute a valid justification for separate or different services* under Section 504 of the Rehabilitation Act, or under [title II of the ADA].

H. R. Rep. 485 (III), 101st Cong. 2d Sess. 50. *reprinted in* 1990 U.S.C.C.A.N. at 73, (emphasis added).

Ironically, DPW asserts a justification of administrative convenience to resist an accommodation which would save an average of $34,500 per year, would allow Idell S. to live at home with her children, and which would not require a single substantive change in its attendant care or nursing home programs. DPW's resistance to such an accommodation is totally inconsistent with Congress' pronouncement that "[t]he Nation's proper goals regarding individuals with disabilities are to assure equality of

opportunity, full participation, [and] independent living. . . ." 42 U.S.C. § 12101(a)(8).

DPW asserts that it cannot change Idell S.'s care because the nursing home and attendant care programs are currently funded on two separate lines of its budget.[24] The General Appropriations Act. Act 1-A of 1993, at 104, 115. DPW asserts that "[u]nder state constitutional law, Secretary Snider cannot move funds from one line to another." *See* Brief of Appellee at 14-15 (citing *Ashbourne School v. Commonwealth, Department of Education*, 43 Pa. Com. 593, 403 A.2d 161 (1979). It is not now up to us to invent a funding mechanism whereby the Commonwealth can properly finance its nursing home and attendant care programs. However, the ADA applies to the General Assembly of Pennsylvania, and not just to DPW. DPW can not rely upon a funding mechanism of the General Assembly to justify administering its attendant care program in a manner that discriminates and then argue that it can not comply with the ADA without fundamentally altering its program. We dismissed a similar contention in *Delaware Valley Citizen's Council for Clean Air v. Commonwealth of Pennsylvania*, 678 F.2d 470 (3rd Cir. 1982). There, plaintiff sought to hold certain members of the executive branch of state government in contempt for failing to comply with a consent decree in which the officials had agreed to establish an admissions inspection program. After the consent decree had been executed, the General Assembly enacted legislation which specifically "prohibited the expenditure of state funds by the executive branch for the implementation of [that program]. Although the Governor vetoed the bill, the legislature overrode the veto and enacted [the legislation] into law." *Id.* at 473-4. Thereafter, the Department of Transportation "ceased all efforts toward implementing the [program]." *Id.* There, as here, the defendants relied upon *Ashbourne*, to argue that their hands were tied by the power of appropriations vested in the General Assembly. We rejected that position. "These arguments disregard the fact that the Commonwealth itself

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24. This, of course, does not explain why DPW has not changed her status in a new budget year.

was and remains bound by the consent decree." *Delaware Valley Citizens Council*, 678 F.2d at 475. We stated:

> Because the Commonwealth, including all its branches, is bound by the decree, the argument of inability to comply rings hollow. Even if the executive branch defendants were physically or legally incapable of complying with the decree, those Commonwealth officials sitting in the General Assembly certainly are not incapable of insuring the Commonwealth's compliance.

678 F.2d at 476-6. The same applies here: since the Commonwealth has chosen to provide services to Idell S. under the ADA, it must do so in a manner which comports with the requirements of that statute.

VI.

Generally, an appellate court reversing a grant of summary judgment will not direct the district court to enter summary judgment in favor of appellant because a genuine issue of material fact will remain. *First National Bank v. Lincoln National Life Insurance Co.*, 824 F.2d 277, 281 (3d Cir. 1987). However, when an appeal concerns only issues of law, we are free to enter an order directing the district court to enter summary judgment in favor of the appellant. *Kreimer v. Bureau of Police for the Town of Morristown*, 958 F.2d 1242, 1250 (3d Cir. 1992).

Here, there are no genuine issues of material fact because of the Amended Stipulation entered into by the parties. The only issue that remains is the interpretation and application of the ADA and 28 C.F.R. § 130.35(d). Accordingly, we will vacate the order granting summary judgment in favor of defendant and remand this case to the district court for entry of an order granting summary judgment to Idell S. and against DPW.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Filed February 2, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-1243

HELEN L., BEVERLY D., FLORENCE H.,
ILENE F., IDELL S., and AMERICAN DISABLED
FOR ATTENDANT PROGRAMS TODAY ("A.D.A.P.T.")

Idell S., Appellant

v.

ALBERT L. DIDARIO, individually and in his
official capacity as Superintendent of Norristown State
Hospital, and KAREN F. SNIDER, in her capacity as
Secretary, Pennsylvania Department of Public Welfare

Karen F. Snider, Appellee

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 92-6054)

Argued September 13, 1994

Before: MANSMANN, COWEN and McKEE,
Circuit Judges

RECEIVED AND FILED
2.2.95
P. DOUGLAS SISK
CLERK

ORDER AMENDING SLIP OPINION

IT IS HEREBY ORDERED that the following portion of the Slip Opinion at 15 filed in this case on January 31, 1995:

> "The prohibitions contained in the later regulations are under a regulation which states 'Discriminatory actions prohibited.' 45 U.S.C. § 84.4(b)(1). That regulation does not state that the actions set forth are prohibited per se. Rather, it states that recipients of federal funds may not engage in the enumerated acts 'on the basis of handicap.' 45 U.S.C. § 84.4(b)(1)."

be amended as follows:

> "The prohibitions contained in the later regulations are under a regulation which states 'Discriminatory actions prohibited.' 45 C.F.R. § 84.4(b)(1). That regulation does not state that the actions set forth are prohibited per se. Rather, it states that recipients of federal funds may not engage in the enumerated acts 'on the basis of handicap.' 45 C.F.R. § 84.4(b)(1)."

BY THE COURT

/s/ Theodore A. McKee
Circuit Judge

Dated: *February 2, 1995*

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HELEN L., et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
ALBERT DiDARIO, et al.	:	NO. 92-6054

ORDER

AND NOW, this 2nd day of February, 1994, it is hereby ORDERED:

1. By agreement of counsel, Idell S. is added as a plaintiff as to Count One of the amended complaint and counsel's stipulation of facts with regard to Idell S. is filed.

2. Beverly D. and Eileen F. having been discharged from the Philadelphia Nursing Home, upon agreement of counsel, all of their claims in this action are DISMISSED WITH PREJUDICE.

3. For the reasons stated in the Memorandum filed January 27, 1994, the motion for summary judgment of Idell S. is DENIED and judgment is entered in favor of defendants and against plaintiff Idell S. on Count One of plaintiff's amended complaint.

4. The Memorandum issued on January 27, 1994, is AMENDED to read as follows: The average cost to DPW of attendant care in the community is $10,500, for which it receives no federal reimbursement.

THOMAS N. O'NEILL, JR., J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HELEN L., et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
ALBERT DiDARIO, et al.	:	NO. 92-6054

ORDER

AND NOW, this 27 day of January, 1994, upon consideration of plaintiffs' motion for a preliminary injunction, the parties' cross-motions for summary judgment as to Count One, defendant's motion for summary judgment as to Count Two and the supporting and opposing memoranda and correspondence thereto, it is hereby ORDERED that:

1. Plaintiffs' motions for a preliminary injunction and for summary judgment as to Count One are DENIED.

2. Defendants' motion for summary judgment as to Count One is GRANTED. Judgment is entered in favor of defendants and against plaintiffs on Count One of plaintiffs' amended complaint.

3. Defendant's motion for summary judgment as to Count Two is DENIED without prejudice to its renewal at the conclusion of discovery. This Order vacates the stay of discovery previously ordered by the Court.

THOMAS N. O'NEILL, JR., J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HELEN L., et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
ALBERT DiDARIO, et al.	:	No. 92-6054

MEMORANDUM

O'Neill, J. January 27, 1994

I. Background

Plaintiff Helen L. is a 67-year old woman with a traumatic brain injury who was institutionalized at Norristown State Hospital, an institution for persons with mental illness ("Norristown"). Plaintiffs Beverly D. and Eileen F. are women with disabilities who reside at a nursing home in Philadelphia.

Defendant Albert DiDario is the Superintendent of Norristown. Defendant Karen Snider is Secretary of the Pennsylvania Department of Public Welfare ("DPW"), which is responsible for administering the State's Attendant Care Services Act. *See* 62 Pa.Cons.Stat.Ann. § 3051 et. seq.

Plaintiffs Beverly D. and Eileen F. have filed a motion for a preliminary injunction[1] requesting that the Court order defendant Snider to provide them with community-based attendant care services.[2] Both plaintiffs receive Medical Assistance from defendants which pays for their nursing home care and treatment.

Plaintiffs assert that defendant's refusal to provide them with community-based attendant care services violates their rights under the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101. *See* Count One, Plaintiff's amended complaint. On June 25, 1993, the parties agreed to a

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1. Plaintiff Florence H. is not a party to the pending motion. Plaintiff Disabled In Action of Pennsylvania ("DIA") is a Pennsylvania nonprofit corporation whose members are persons with disabilities and also is not a party to the pending motion. Defendants do not challenge this plaintiff's standing.

2. For a description of the attendant care program, see *Easley v. Snider*, 1993 U.S. Dist. LEXIS 18021 (E.D.Pa. Dec. 20, 1993) (Brody, J.).

stipulation of facts in order to allow the Court to rule on plaintiffs' motion for summary judgment, which was filed the same day. Defendants filed a cross-motion for summary judgment. Thereafter, I issued an Order staying discovery pending ruling on the motions for summary judgment.

On June 28, 1993, plaintiff Helen L. was discharged from Norristown to an apartment in the area. Nevertheless, she continues to assert her constitutional claim that defendant DiDario violated her substantive due process rights as a result of her confinement at the Hospital from 1952 until 1993.[3] *See* Count II, Plaintiffs' amended complaint.

For the following reasons, I will grant defendants' motion for summary judgment as to Count One of plaintiffs' amended complaint and deny defendants' motion as to Count Two. If appropriate, defendants may renew their motion for summary judgment as to Count Two at the close of discovery.

II. Discussion

A. Plaintiffs' ADA Claim

1. Summary Judgment Standard

Under Fed.R.Civ.P. Rule 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Hines v. Conrail*, 926 F.2d 262, 267 (3d Cir. 1991).

Under Rule 56, summary judgment will be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The party moving for summary judgment bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. *Id.* at

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3. As a result of her discharge from Norristown State Hospital, Helen L. is relinquishing her claim under the ADA. *See* Letter of Plaintiffs' Counsel, dated June 25, 1993.

322-323. The moving party is not required to support its motion with affidavits or other similar materials negating the opponent's claim. *Id.*

If the moving party sustains this burden, the nonmoving party must set forth facts demonstrating the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Rule 56(e) provides that when a properly supported motion for summary judgment is made, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." An issue of material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 255; *Brenner v. United Brotherhood of Carpenters & Joiners*, 927 F.2d 1283, 1287-88 (3d Cir. 1991).

In addition, "the existence of disputed issues of material fact should be ascertained by resolving 'all inferences, doubts and issues of credibility against the moving party.'" *Ely v. Hall's Motor Transit Co.*, 590 F.2d 62, 66 (3rd Cir. 1978), quoting *Smith v. Pittsburgh Gage & Supply Co.*, 464 F.2d 870, 874 (3rd Cir. 1972).

2. Factual Background

This summary of relevant facts is based on the stipulation submitted by the parties.

Beverly D., a 46-year old woman, has resided at a nursing home in Philadelphia since September 29, 1988. She is the mother of two daughters and a student at Philadelphia Community College. Before she was admitted to the nursing home, Beverly D. injured herself escaping from a fire in her home. As a result, she has no vision in her right eye and uses a wheelchair. Because of her physical handicaps, Beverly D. requires and receives at the nursing home assistance with daily living activities, such as bathing, preparing meals, doing laundry and shopping. However, she does not require nursing supervision or care.

DPW pays for these services under its Medical Assistance Program. Beverly D. wants to live outside the nursing home and in the community. On January 13, 1993, Homemaker Service of the Metropolitan Area, Inc. ("Homemaker"), determined that she is eligible for attendant care ser-

vices in the community.[4] Homemaker also informed Beverly D. that "funding limitations" prevent it from providing such services to her.[5]

Eileen F., a 46-year old woman, resides at the same nursing home. She was admitted in 1991 after suffering a stroke which requires her to use a wheelchair.[6] She has family in Philadelphia and, like Beverly D., wants to live in the community. Similarly, although she requires assistance with daily living activities, Eileen F. would not require nursing home care if she received attendant care services. On January 13, 1993, Homemaker informed her that she is eligible for attendant care services in the community but that it lacks funds to provide the services.

At the nursing home, plaintiffs live only with other persons who have disabilities. They do not live with their families and friends and "are not visited by non-disabled persons." *See* Stipulation of Facts at ¶¶.38-39. Defendants concede that the "setting for the provision of attendant care services appropriate to the needs of Beverly D. and Eileen F. is in the community" and that a "nursing home is not the setting in which plaintiffs could be provided attendant care services and have maximum contact with nondisabled persons." *See* Stipulation of Facts at ¶¶.43, 44. Plaintiffs therefore "must remain in a nursing home in order to receive the attendant care services which they require." *Id.* at ¶.45.

The parties agree that the average cost to DPW of nursing home care is $45,000 a year, of which 56 percent is derived from federal reimbursement and 44 percent from state funds. The average cost to DPW of attendant care in the community is $10,500, for which it receives federal reimbursement. Defendant DPW has not requested that the federal funds be used to pay for attendant care services for the women in the community.

3. Discussion

Congress passed the ADA to provide protection for persons with disabilities against discrimination. The Act specifically prohibits discrimination in employment (Title I), in public services (Title II), in public

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4. Homemaker is a subcontractor of DPW that has been chosen to provide attendant care services for eligible persons.

5. *See* Letter from Homemaker Service of the Metropolitan Area, Inc., to Beverly D., dated January 13, 1993, attached to Stipulation of Facts.

6. "Eileen F. has no use of her left upper extremity, a mild vision and hearing deficit and some difficulty with speech." *See* Stipulation of Facts at ¶.26, dated June 25, 1993.

accommodations (Title III) and in telecommunications (Title IV). *See Kinney v. Yerusalim*, 812 F.Supp. 547, 548 (E.D.Pa. 1993), *aff'd*, 1993 U.S.App. LEXIS 30167 (3d Cir. 1993).

Title II of the ADA prohibits state and local governments from discriminating on the basis of disability. Title 42 U.S.C. § 12132 provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C.A § 12132 (Supp. 1993).[7] Prior to the ADA, the prohibition against discrimination covered only those programs and services of government entities that received financial assistance. *See* 29 U.S.C. § 794.

The ADA's Findings and purposes state:

> ° ° ° °
>
> (2) historically, society has tended to isolate and segregate individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
>
> (3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting and access to public services;
>
> ° ° ° °
>
> (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

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7. The term public entity is defined in § 12131 and includes "any State or local government." *Id.* at § (1) (A).

° ° ° °

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; . . . .

42 U.S.C.A. § 12101 (Supp. 1993).

This case turns on the interpretation of what plaintiffs call the "integration mandate" of the ADA. Plaintiffs focus on the setting in which they receive services; they allege that even though defendants provide services under two different programs defendants are required to furnish those services in the setting that best integrates plaintiffs into their community.

Plaintiffs insist that defendant's refusal to provide attendant care services violates the integration mandate, which they derive from Titles II[8] and III[9] of the ADA. In their memorandum, Plaintiffs review the regulations detailing and implementing the Act's integration mandate. *See, e.g.*, 28 C.F.R. § 35.130(d) (regulation intended to effectuate Title II of the ADA stating that a "public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities").

Plaintiffs also assert that cases construing section 504 of the Rehabilitation Act, 29 U.S.C. § 794, are instructive in determining the meaning of the ADA but that the ADA does more than extend the Rehabilitation Act. *See, e.g.*, 28 C.F.R. § 35.103(a) ("Except as otherwise provided in this part, this part shall not be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973.").

Defendants respond that they are in compliance with the law so long as plaintiffs receive services for which they are eligible and that the Court cannot otherwise dictate how defendants provide those services. Stated another way, defendants maintain that they are required only to ensure that plaintiffs are not discriminated against in comparison with other individuals who are chosen to receive attendant care services.

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8. *See* 42 U.S.C.A. § 12134(a), which authorizes 28 C.F.R. § 35.101 et seq.

9. *See* 42 U.S.C.A. § 12182(b)(1)(B), which states: "Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual."

I conclude that defendants' position is legally correct. My ruling is guided by the reasoning of the Massachusetts Supreme Court in *Williams v. Secretary of the Executive Office of Human Services*, 414 Mass. 551, 609 N.E. 2d 447 (1993).

In *Williams*, plaintiffs, a group of homeless and mentally ill individuals, sued the State's Department of Mental Health with respect to the methods by which it served patients. Plaintiffs pursued a number of statutory and constitutional claims, including a claim that the Department did not provide "a sufficient amount of integrated supported housing to satisfy the requirements of the ADA." *Id.* at 556.

In a unanimous decision, the Court rejected plaintiffs' ADA claim. The Court held that the ADA does not require a state to provide services in an integrated setting. The Court explained:

> nothing in the ADA requires that a specific proportion of housing placements provided by a public mental health service be in 'integrated' housing. Nor does anything in the ADA or its 'integration regulations' address the absence of sufficient integrated residential placements to satisfy the entire demand for such services.

Id. at 556-557. The Court continued:

> [t]he focus of Federal disability discrimination statutes is to address discrimination in relation to nondisabled persons, rather than to eliminate all differences in levels or proportions of resources allocated and services provided to individuals with differing types of disabilities. . . . Courts do not determine whether an agency's allocation of resources or provision of services is efficient or in proportion to the obvious and pressing need of the disabled within the Commonwealth.

Id. at 559-560.[10]

The record developed by the parties establishes that plaintiffs are denied attendant care services because of lack of funds. It does not demonstrate that they have been denied funding for attendant care services because they are disabled. Plaintiffs' failure to show that they have been excluded from the attendant care services program on the basis of their disability is fatal to their claim. *Cf. Martin v. Voinovich*, 1993 U.S. Dist. LEXIS 18468 at *44 (E.D.Ohio Dec. 14, 1993).

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10. The Court's decision addressed claims under Title II and Title III of the ADA.

Even though defendant Snider concedes that it is more expensive and less salutary for plaintiffs to remain in a nursing home rather than receive attendant care services, this admission does not authorize the Court to adjust the Department's allocation of resources or provision of services. Plaintiffs assert that the fact that they would be served better by attendant care services distinguishes their case from *Williams*. Given the separation of powers reasoning in *Williams* that requires courts to avoid involving themselves in administrative agency policy decisions, I am unable to agree.[11]

Plaintiffs also contend that a judgment in favor of defendants will render the "integration mandate" of 28 C.F.R. § 35.130(d) meaningless. However, this integration mandate may not be invoked unless there is first a finding of discrimination. *See, e.g., Williams* at 558. *See also Pinnock v. International House of Pancakes,* 1993 U.S. Dist. LEXIS 16399 at *18-20 (S.D.Cal. Nov. 8, 1993) (discussing "most integrated setting" language of regulations implementing Title III of the ADA).[12]

I will deny plaintiffs' request for a preliminary injunction and enter judgment in favor of defendants on Count One.

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11. In a letter to the Court dated January 13, 1994, counsel for plaintiffs provided the following information about a pending case in Pennsylvania Commonwealth Court that is relevant to this dispute. The letter explains that *Williams v. Snider,* No. 0013 M.D. 1993 (Commw. Ct.) "is a mandamus action that seeks to require DPW to apply for available federal funding for personal assistance care services for disabled people. As a result of the *Williams* litigation, DPW has commissioned a study to determine the feasibility of receipt of federal funds by successfully applying for a waiver under the Medicaid Program for a Personal Assistance Services Program for persons with physical disabilities modeled after Pennsylvania's Act 150 Attendant Care Program. . . . DPW is still in the process of making a decision whether or not to apply for those federal funds." Even if DPW decided to apply for federal funds, the Federal Health Care Financing Administration must approve the application. The letter concludes that the Commonwealth Court has stayed proceedings in Williams pending the agencies' decision-making process. *See* Letter of Stephen F. Gold, plaintiffs' counsel, dated January 13, 1994.

12. In *Pinnock,* the court noted that the "preamble to the [T]itle III regulation provides two pages of examples and explanations illustrating the meaning of this provision. One example provides that it would be a violation of this provision to require persons with mental disabilities to eat in the back room of a restaurant or to refuse to allow a person with a disability to full use of a health spa because of stereotypes about the person's ability to participate." *Pinnock* at *19.

B. Helen L.'s Constitutional Claim

1. Factual Background

Helen L. was admitted to Philadelphia Hospital sometime in the early 1950s and remained there until 1971, when she was taken to Norristown. She was admitted to Norristown as an involuntary patient pursuant to a court order for interim commitment, which noted that she was "Mentally Ill." *See* Attachment 2 to Defendant's Motion for Summary Judgment, dated July 22, 1993.

According to her verified complaint, Helen L. is not and never was mentally ill.[13] Defendant admits that her "organic brain injury . . . is not a mental illness." *See* Defendant's Answer to Amended Complaint at ¶.22, filed December 23, 1992.[14]

Plaintiff alleges and DiDario[15] admits that at the time Helen L. was admitted to Norristown the hospital staff recommended "the starting of discharge planning probably to a better supervised, all female, boarding home." *See* Defendant's Answer to Amended Complaint at ¶.23.

In February 1977, Helen L. apparently signed a form consenting to receive inpatient treatment at Norristown. *See* Attachment 3 to Defendant's Motion for Summary Judgment. She also apparently checked a box on the form stating that she could leave the hospital upon written request with up to 72 hours notice. *Id.*[16] Despite defendant's efforts to discharge plaintiff over the years, she did not leave Norristown until June 1993.

In her verified complaint, plaintiff states that she received Mellaril, a psychotropic medicine, while at the hospital. In addition, Helen L. has

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13. Plaintiff suffered traumatic brain trauma when she was hit by a trolley car at the age of three. She is able to read and write. *See* Plaintiffs' Amended Complaint at ¶¶.17, 18.

14. Defendant DiDario maintains that "Helen L's diagnosis at Norristown State Hospital most typically was organic brain syndrome with mild mental retardation, sometimes with psychosis, sometimes without." *See* Affidavit of Albert DiDario at ¶.11, dated July 20, 1993.

15. In her memorandum of law, plaintiff states that she does not seek damages against defendant Snider. *See* Plaintiff's Memorandum of Law at 32, filed August 5, 1993. My discussion of her constitutional claim therefore only concerns defendant DiDario.

16. The form included another box stating that she could leave "at any time" she expressed her "desire to leave in writing." *See* Attachment 3 to Defendant's Motion for Summary Judgment, dated July 22, 1993.

submitted an affidavit stating:

> 1. Since I moved to Norristown State Hospital, I believed I was not permitted to leave, but had to stay there.
>
> 2. For many years I lived in a locked ward with many other women. I could not leave the ward without permission of the staff. . . . Often, other women at Norristown State Hospital would bother me but I could not leave the locked ward to get away from them.
>
> 3. Frequently over the years, I was denied permission to leave the ward. I do not know why I had to live in this locked ward or why I was not permitted to leave it.
>
> ° ° ° °
>
> 5. I do not remember signing any papers about staying at Norristown State Hospital. No one ever explained my rights or why I was there. I have always believed that I could not leave Norristown State Hospital and had no option about leaving and no option about living somewhere else. No staff at Norristown State Hospital ever told me I could leave if and whenever I wanted.
>
> 6. I did not ask to be placed at Norristown State Hospital and did not stay there on my own.
>
> 7. I told the staff over and over that I wanted to live in Northeast Philadelphia near my sisters but they never told me how I could do this.
>
> 8. The staff made me take medicine and have shock treatment even though I did not want it, and my memory is worse.

See Affidavit of Helen L., dated August 3, 1993.

2. Discussion

Plaintiff asserts that defendant DiDario violated her substantive due process rights under the Fourteenth Amendment by failing to place her in an appropriate community setting and unnecessarily maintaining her in an institution. Because she has been discharged from Norristown, she now has only a claim for damages against defendant for his alleged violation of her constitutional rights.

Defendant responds that plaintiff's claim should fail because his conduct did not violate the Constitution. Alternatively, he maintains that the

Eleventh Amendment and the doctrine of qualified immunity prevent plaintiff from collecting damages for any constitutional violation that may have occurred. Defendant also contends that because Helen L. voluntarily committed herself to Norristown in 1977 he is not liable for any injury she may have suffered while she was there. *See generally DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989) (establishing limits of State's affirmative duty to protect individuals).

I am unable to agree with defendant that the record developed by the parties thus far demonstrates that defendant is entitled to judgment as a matter of law. Because plaintiff may not have been voluntarily committed to Norristown even after 1977, she may have a claim under *Youngberg v. Romeo*, 457 U.S. 307 (1982) (involuntarily committed person has constitutional right to safe conditions, to freedom from bodily restraint and to training). *See also* DeShaney at 199-201 (discussing *Youngberg*); *Clark v. Cohen*, 794 F.2d 79, 87 (3d Cir.), *cert. denied*, 479 U.S. 962 (1986) (upholding trial court findings that plaintiff's "substantive liberty right to appropriate treatment under *Romeo* was violated"). There is also a factual question whether she was free to leave the institution. The Order accompanying this Memorandum will lift my July Order staying discovery in the case. If appropriate, defendant may renew his motion for summary judgment after discovery has concluded.

The Eleventh Amendment does not bar Helen L. from suing defendant DiDario in his individual capacity as Superintendent of Norristown State Hospital. *See Hafer v. Melo*, 112 S.Ct. 358 (1991). In my view the present record is not sufficient to enable me to rule on defendant's defense of qualified immunity. Defendant may renew this defense by motion after the close of discovery.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-1243

HELEN L., BEVERLY D., FLORENCE H.,
ILENE F., IDELL S., and AMERICAN DISABLED
FOR ATTENDANT PROGRAMS TODAY ("A.D.A.P.T.")

Idell S., Appellant

v.

ALBERT L. DiDARIO, individually and in his
official capacity as Superintendent of Norristown
State Hospital, and KAREN F. SNIDER, in her capacity
as Secretary, Pennsylvania Department of Public Welfare

Karen F. Snider, Appellee

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*,
BECKER, STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO,
ROTH, LEWIS, McKEE and SAROKIN
Circuit Judges.

The petition for rehearing filed by appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judges Becker, Stapleton, Hutchinson, Alito and Roth would grant rehearing.

BY THE COURT,

Circuit Judge

DATED: Feb. 24, 1995

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

RICKY WYATT, by and through his aunt and legal guardian, Mrs. W. C. Rawlins, Jr., et al.,	:	
Plaintiffs,	:	
DIANE MARTIN, et al.,	:	
Plaintiff-Intervenors,	:	
v.	:	CIVIL ACTION NO. 3195-N
RICHARD E. HANAN, as Commissioner of Mental Health and Mental Retardation, and the State of Alabama Mental Health Officer, et al.,	:	
Defendants,	:	
UNITED STATES OF AMERICA,	:	
Amicus Curiae.	:	

ORDER

Now before the court is the defendants' motion for judgment on the pleadings, filed December 12, 1994 (Doc. no. 363), and the plaintiffs' motion for summary judgment, filed December 19, 1994 (Doc. no. 407), both on the plaintiffs' claim under the American with Disabilities Act (ADA), 42 U.S.C.A. §§ 12101-12213. Upon consideration of these motions, it is ORDERED that they are denied.

The court agrees with the defendants that the ADA does not require unqualified and indiscriminate deinstitutionalization and community placements—or, for the matter, even institutionalization—of mentally ill

and mentally retarded persons. *Helen L. v. DiDario,* No. 94-1243, __ F.3d __, __, 1995 WL 34200, at *10 (3rd Cir. Jan. 31, 1995). Instead, it requires that services or programs provided by a public entity "integrate" qualified disabled individuals with non-disabled persons to the fullest extent appropriate for the disabled, 28 C.F.R. § 35.130(d), 28 C.F.R. pt. 35, App. A at 452, and reasonable for the public entity (that is, accommodation of the patient's disability would not be administratively and financially undue and would not fundamentally alter the nature of the entity's program), *School Bd. of Nassau County v. Arline,* 480 U.S. 273, 287 n.17, 107 S.Ct. 1123, 1131 n.17 (1987); *Alexander v. Choate,* 469 U.S. 287, 105 S.Ct. 712 (1985); H.R. Rep. No. 485 (II), 101st Cong., 2d Sess. at 84 *reprinted in* U.S.C.C.A.N. 303, 367. If for a disabled patient and an institution this meant community based placement, then that would be required, and if for a patient and an institution it meant institutionalization, then that would be appropriate.

A motion for judgment on the pleadings "cannot be granted 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Lemon v. Dugger,* 931 F.2d 1465, 1468 (11th Cir. 1991) (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02 (1957)). A motion for summary judgment cannot be granted unless "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986). Neither of these standards with respect to the plaintiffs' ADA claim has been satisfied on the current record.

The Court notes that the defendants have further argued that the plaintiffs' ADA claim is not properly before the court under Rule 8(a) of the Federal Rules of Civil Procedure because they never formally amended their complaint to add it. This argument is meritless. On January 22, 1993, the plaintiffs filed (1) a motion seeking further relief under the ADA and (2) a motion for leave to assert claim under the ADA. On February 10, 1993, the court granted the second motion and thereby allowed the plaintiffs to amend their claims in this litigation to include one based on the ADA.

DONE, this the 6th day of March, 1995.

Myron H. Thompson
UNITED STATES DISTRICT JUDGE

TITLE 42–U.S. CODE
AMERICANS WITH DISABILITIES ACT–SUBCHAPTER II
PUBLIC SERVICES

Part A–Prohibition Against Discrimination and Other Generally Applicable Provisions

§ 12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 502(8) of title 45).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

(Pub. L. 101-336, title II, § 201, July 26, 1990, 104 Stat. 337.)

§ 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.
(Pub. L. 101-336, title II, § 202, July 26, 1990, 104 Stat. 337.)

§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.
(Pub. L. 101-336, title II, § 203, July 26, 1990, 104 Stat. 337.)

§ 12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under section 794 of title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

(Pub. L. 101-336, title II, § 204, July 26, 1990, 104 Stat. 337.)

TITLE 29–U.S. CODE (1988)
SECTION 504 OF THE
REHABILITATION ACT OF 1973

§ 794. Nondiscrimination under Federal grants and programs; promulgation of rules and regulations

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. [Regulation promulgation procedures omitted.]

(Pub. L. 93-112, title V, § 504, Sept. 26, 1973, 87 Stat. 394; Pub. L. 95-602, title I, §§ 119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987.)

TITLE 28–CODE OF FEDERAL REGULATIONS

§ 41.51(d)

Recipients shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

§ 35.130(d)

A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

PENNSYLVANIA CONSTITUTION–ARTICLE III

§ 24. Paying out public moneys

No money shall be paid out of the treasury, except on appropriations made by law and on warrant issued by the proper officers. . . .

TITLE 62–PURDON'S STATUTES
ATTENDANT CARE SERVICES ACT

§ 3051. Short title

This act shall be known and may be cited as the Attendant Care Services Act.

1986, Dec. 10, P.L. 1477, No. 150, § 1, effective July 1, 1987.

§ 3052. Declaration of policy

The General Assembly declares it is the policy of this Commonwealth that:

(1) The increased availability of attendant care services for adults will enable them to live in their own homes and communities.

(2) Priority recipients of attendant care services under this act shall be those mentally alert but severely physically disabled who are in the greatest risk of being in an institutional setting.

(3) Recipients of attendant care have the right to make decisions about, direct the provision of and control their attendant care services. This includes, but is not limited to, hiring, training, managing, paying and firing of an attendant.

(4) Attendant care services may be provided by county governments and county human service departments.

(5) Subject to available funds, attendant care programs should be developed to serve eligible individuals throughout this Commonwealth.

1986, Dec. 10, P.L. 1477, No. 150, § 2, effective July 1, 1987.

§ 3053. Definitions

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Attendant care services."

(1) Those basic and ancillary services which enable an eligible individual to live in his home and community rather than in an institution and to carry out functions of daily living, self-care and mobility.

(2) Basic services shall include, but not be limited to:

(i) Getting in and out of a bed, wheelchair and/or motor vehicle.

(ii) Assistance with routine bodily functions, including, but not limited to:

(A) Health maintenance activities.

(B) Bathing and personal hygiene.

(C) Dressing and grooming.

(D) Feeding, including preparation and cleanup.

(3) If a person is assessed as needing one or more of the basic services, the following services may be provided if they are ancillary to the basic services:

(i) Homemaker-type services, including, but not limited to, shopping, laundry, cleaning and seasonal chores.

(ii) Companion-type services, including, but not limited to, transportation, letter writing, reading mail and escort.

(iii) Assistance with cognitive tasks, including, but not limited to, managing finances, planning activities and making decisions.

"Department." The Department of Public Welfare of the Commonwealth

"Eligible individual." Any physically disabled/mentally alert person 18 through 59 years of age who meets all of the following requirements:

(1) Experiences any medically determinable physical impairment which can be expected to last for a continuous period of not less than 12 months.

(2) Is capable of selecting, supervising and, if needed, firing an attendant.

(3) Is capable of managing his own financial and legal affairs.

(4) Because of physical impairment, requires assistance to complete functions of daily living, self-care and mobility, including, but not limited to, those functions included in the definition of attendant care services.

"Personal care attendant." An individual other than a family member who provides attendant care services to eligible individuals.

"Secretary." The Secretary of Public Welfare of the Commonwealth. 1986, Dec. 10, P.L. 1477, No. 150, § 3, effective July 1, 1987.

§ 3054. Program

(a) Establishment.—The department shall establish and develop under this act programs of attendant care services for eligible individuals.

(b) Solicitation of proposals.—The department shall solicit proposals to provide attendant care services under this act. Providers shall submit proposals in the form and manner required by the department.

(c) Proposal selection criteria.—Proposals shall be selected based on service priorities developed by the department; however, priority shall be given to proposals that will serve the severely disabled and those at greatest risk of being institutionalized as defined by the department.

(d) Agreements with providers.—In order to provide attendant care services, the department may enter into agreements with providers. Each agreement shall include, at minimum, the number of clients to be served, the types of attendant care services to be provided, the cost of services, the method of payment and the criteria to be used for evaluating the provision of services.

(e) Participation of eligible clients.—Providers, where appropriate, shall include eligible clients in the planning, startup, delivery and administration of attendant care services and training of personal care attendants.

(f) Consumer assessment reports.—Determination of eligibility and the need for attendant care services shall be supported by consumer assessment reports as required by the department.

(g) Weekly maximum hours of service.—Each attendant care provider agency's average hours of service per consumer must not exceed 40 hours per seven-day week.

(h) Waiting list.—The department and providers shall develop a waiting list, by service priority, for those eligible clients who cannot be served immediately.

1986, Dec. 10, P.L. 1477, No. 150, § 4, effective July 1, 1987.

§ 3055. Funding

(a) Use of funds.—Funds made available under this act shall be used only for the planning, designing, delivering and administering of attendant care services and training of personal care attendants.

(b) Federal and private funds.—Programs for attendant care services, under this act, shall use Federal funds, where possible. The department shall apply for and use, subject to specific appropriation by the General Assembly, all Federal funds which become available to carry out a program of attendant care services under this act. The department shall use any private funds which become available to carry out a program of attendant care services under this act.

(c) Program fee schedule.—The department shall develop, wherever practical, a sliding fee schedule for attendant care services for eligible clients.

(d) Disbursement of funds.—The department shall disburse funds in a manner that ensures, to the extent of available funds, equitable distribution of service among eligible clients with attendant care needs and among various regions of this Commonwealth.

(e) Availability of services.—Attendant care services shall be available only to the extent that they are funded through annual appropriation of State and Federal funds and program fees.

1986, Dec. 10, P.L. 1477, No. 150, § 5, effective July 1, 1987.

§ 3056. Demonstration projects

The department may initiate demonstration projects to test new ways of providing attendant care services, as well as conduct specific research into ways to best provide attendant care services in both urban and rural environments.

1986, Dec. 10, P.L. 1477, No. 150, § 6, effective July 1, 1987.

§ 3057. Rules or regulations

The department shall promulgate such rules or regulations as may be necessary for the effective administration of any programs of attendant care services under this act.

1986, Dec. 10, P.L. 1477, No. 150, § 7, effective July 1, 1987.

§ 3058. Report

Prior to June 30, 1988, the secretary shall submit a report to the legislative committees having jurisdiction over appropriations and the legislative committees having jurisdiction over health and welfare service. This report shall include at least the following information regarding attendant care services:

(1) A summary of the attendant care services provided under this act, including, but not limited to, a description of service models utilized, costs by service model, unit of service and per client, and client demographics.

(2) Recommendations regarding the direction of and funding priorities for attendant care services for fiscal years 1988-1989 and 1989-1990.

1986, Dec. 10, P.L. 1477, No. 150, § 8, effective July 1, 1987.

(2)

Supreme Court, U.S.
FILED
JUN 22 1995
OFFICE OF THE CLERK

No. 94-1946

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

SECRETARY OF PUBLIC WELFARE
OF THE COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

IDELL S.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Court of Appeals correctly concluded that Petitioner violated the Americans with Disabilities Act by providing attendant care services to a qualified individual with a disability only in a segregated nursing facility when Petitioner stipulated that it was appropriate and less expensive to provide Respondent with the same attendant care services through its existing community-based program?

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

No. 94-1946

Secretary of Public Welfare
of the Commonwealth of Pennsylvania,

Petitioner,

v.

Idell S.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STATEMENT OF THE CASE

A. Facts

Respondent Idell S., a forty-three year old woman with two children, is paralyzed from the waist

down as a result of meningitis. Pet. App. at A-5.[1] Due to her physical disability, Idell S. must use a wheelchair and she requires "attendant care services" to assist her with certain activities of daily living, including transferring to and from her bed and wheelchair, bathing, dressing, and toileting. J.A. at 245-246. Id.

The Department of Public Welfare ("DPW"), administered by Petitioner, provides attendant care services to people with physical disabilities in two settings -- nursing facilities and the community. Pet. App. at A-5; J.A. at 245. Idell S. was forced to enter a nursing facility paid for by Petitioner in December 1989 and to stay there only because she was unable to obtain services she needs to assist her with her daily living activities in the community. See id. As the Court of Appeals noted, "[t]he parties agree that, although Idell S. is not capable of fully independent

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[1]References to "Pet. Br." and "Pet. App." are to the Brief and Appendix to the Petition for A Writ of Certiorari, respectively. References to "J.A." are to the Joint Appendix filed in the Court of Appeals and, in particular, to the facts to which the parties stipulated. J.A. at 243-47.

living, she is not so incapacitated that she needs the custodial care of a nursing home." Pet. App. at A-5. In the nursing facility, Idell S. was unable to live with and raise her children and to live with people without disabilities. See Pet. App. at A-6; J.A. at 245.

In September 1993, DPW rejected Idell S.'s application to receive attendant care services in her own home through DPW's existing community attendant care program, rather than in the nursing facility, even though DPW stipulated that "[t]he setting for the provision of attendant care services appropriate to the needs of Idell S. is in the community" and that "[w]ith attendant care services in the community, nursing home care would not be appropriate for Idell S." J.A. at 244, 245. See also Pet. App. at A-6. DPW's refusal to provide Idell S. with attendant care services in her own home was particularly puzzling in light of the stipulated facts that DPW already operated a program to provide in-home attendant care services and that the average cost to DPW of the community attendant care program is $9,300 less than the average cost to the state of nursing facility care. J.A. at 245, 246.

B. Procedural History

Idell S. filed this lawsuit to challenge DPW's continued provision of attendant care services to her in a nursing facility, rather than in the community. Idell S. contended that DPW's failure to provide her with attendant care services in the community violated Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12134, and, in particular, a regulation, 28 C.F.R. § 35.130(d), promulgated by the Department of Justice ("DOJ") pursuant to 42 U.S.C. § 12134(b). The parties stipulated to the relevant facts and filed cross-motions for summary judgment. The District Court granted summary judgment in favor of Petitioner, and Idell S. appealed.

Following full briefing by the parties, the Court of Appeals invited the United States to participate as an amicus. In its amicus brief and at oral argument, the United States informed the court that DPW violated the ADA regulation, when the parties stipulated that it was appropriate and less expensive to provide Idell S. with attendant care services in her own home rather than in the nursing facility, because the failure to provide such in-home services resulted in Idell S.'s unnecessary

segregation. Such unnecessary segregation, as well as disparate treatment between people with disabilities and those without disabilities, violates the ADA. See Pet. App. at A-17 (citing Brief of Amicus at 7).

Following the explicitly-stated statutory purposes in the ADA and giving substantial deference to DOJ's interpretation of its own regulation, the unanimous Court of Appeals held that the ADA prohibited DPW from providing attendant care services to Idell S. in an unnecessarily segregated setting under the circumstances of this case. The factual stipulations led the Court of Appeals to conclude that DPW violated the ADA by providing attendant care services to Idell S. in the nursing facility, rather than in her home, when DPW had agreed that the nursing facility was not appropriate. Furthermore, the court concluded that DPW's violation was not excusable because, as DPW stipulated, it would be less costly to care for her in the already-established program in the community, and therefore requiring DPW to provide attendant care services to Idell S. in her own home would not result in an undue burden or fundamental alteration of its programs.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. THE THIRD CIRCUIT'S DECISION IS CORRECT AND DOES NOT RAISE AN IMPORTANT ISSUE WARRANTING CERTIORARI.

A. The Court Of Appeals Simply Applied The Congressionally-Mandated Regulation To The Stipulated Facts.

The Court of Appeals found the regulation at issue was promulgated at the express direction of Congress in the ADA, 42 U.S.C. § 12134(b). The regulation at issue plainly requires that "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). This case involved the application of the regulation to the stipulated facts. DPW provided Idell S. with a service known as "attendant care" in a nursing facility. DPW stipulated that "[t]he setting for the provision of attendant care services appropriate to the needs of Idell S. is in the community" and not the nursing facility. J.A. at 245. Thus, the Third Circuit simply applied the plain language of the regulation to

the stipulated facts when it concluded that DPW's provision of attendant care services to Idell S. in the nursing facility, rather than the more integrated setting of her own home and community, violated the ADA.

Petitioner, however, ignores the plain language of the regulation and incorrectly contends that it applies only to "services, programs, and activities" that the public entity makes available to all people (i.e., both people with and without disabilities) and excludes those "services, programs, and activities" that are provided only to people with disabilities (such as attendant care services). Petitioner's argument is premised on the erroneous assumption that Title II of the ADA prohibits only disparate treatment of individuals with disabilities in relation to non-disabled persons. Pet. at 7-8. The Court of Appeals rejected Petitioner's argument and held that the unnecessary segregation of Idell S. was in itself a violation under the ADA.

In accordance with the law established by this Court, the Court of Appeals could not accept Petitioner's argument since doing so would have required it to reject the plain language of 28 C.F.R. § 35.130(d), a regulation that DOJ promulgated at the

express direction of Congress in 42 U.S.C. § 12134(b). See Pet. App. at A-11-A-12. Moreover, the Court of Appeals had the benefit of DOJ's own interpretation of Section 35.130(d). "It is well-established that 'an agency's construction of its own regulation is entitled to substantial deference.'" Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 150 (1991) (citation omitted). In other words, as long as the promulgating agency's interpretation "'sensibly conforms to the purpose and wording of the regulation,'" the courts must adhere to it because the courts "presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking power." Id. at 151. Given the deference that must be afforded to DOJ's interpretation of a regulation promulgated pursuant to congressional authority, the Court of Appeals properly adopted DOJ's interpretation of 28 C.F.R. § 35.130(d). For the same reason, certiorari is inappropriate.[2]

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[2]While a court need not grant deference to an agency's "convenient litigating position," Bowen v. Georgetown University Hospital, 488 U.S. 204, 213 (1988), DOJ's interpretation of the statutorily-mandated

The recognition by the Court of Appeals and DOJ that Section 35.130(d) required DPW in this case to provide services to Idell S. in her own home, rather than in the nursing facility, even though such services are available only to people with disabilities, is fully consistent with the ADA. Surveying the ADA's statutory language and legislative history, the Court of Appeals explained that segregation of people with disabilities was a key problem that Congress sought to address and that integration was the remedy that Congress chose to end segregation.[3]

The court recognized that Congress knew that "discrimination" against people with disabilities can take various forms, writing: "In enacting the ADA, Congress found that '[h]istorically, society has tended to isolate and segregate individuals with disabilities, and ... such

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regulation does not constitute a "litigating position," convenient or otherwise. DOJ was never a party to this lawsuit and, indeed, did not even agree to participate as an amicus until requested to do so by the Court of Appeals.

[3]Indeed, even Petitioner is forced to concede that "[t]he ADA has integration as a major objective ...." Pet. Br. at 13 (emphasis added).

forms of discrimination ... continue to be a serious and pervasive social problem.' 42 U.S.C. § 12101(a)(2) (emphasis added). Congress also concluded that '[i]ndividuals with disabilities continually encounter various forms of discrimination, including ... segregation ....' 42 U.S.C. § 12101(a)(5) (emphasis added)." Pet. App. at A-12 (emphases in original). The Court of Appeals further observed that "[t]he House Report on the ADA noted that: 'Unlike the other titles in this Act, title II does not list all of the forms of discrimination that the title is intended to prohibit. Therefore the purpose of [42 U.S.C. § 12134] is to direct ... Attorney General [Richard Thornburgh] to issue regulations setting forth the forms of discrimination prohibited.' H.R. Rep. No. 485 (III), 101st Cong., 2d Sess., 52 (1990) (emphasis added)." Id. at A-12-A-13 (emphases in original).

As the Court of Appeals concluded, Congress's recognition that disability-based discrimination is multi-faceted and that segregation is one form of such discrimination led Congress to use the ADA to maximize integration of people with disabilities.

> In furtherance of the objective of eliminating discrimination against the

> disabled, Congress stated that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals[.]" 42 U.S.C. § 12101(a)(8) (emphasis added). Similarly in response to its mandate, the Department of Justice stated "[i]ntegration is fundamental to the purposes of the Americans with Disabilities Act." 28 C.F.R. Part 35, App. A, § 35.130. Accordingly, the integration mandate of § 35.130(d) is contained under 28 C.F.R. § 35.130 which is entitled "[g]eneral prohibitions against discrimination."

Pet. App. at A-13 (emphases in original; footnote omitted).

The court's analysis demonstrates that Congress intended the ADA not only to remedy disparate treatment of individuals with disabilities vis-a-vis individuals without disabilities, but also to ensure that individuals with disabilities be integrated (to the extent possible and appropriate) in the community where they can participate in and contribute to society. Accordingly, in finding that the Petitioner violated the ADA, the Court of Appeals correctly applied the statute

and its regulation to the stipulated facts that "the setting for the provision of attendant care services appropriate to the needs of Idell S. is the community," that "with attendant care services in the community, nursing home care would not be appropriate for Idell S." and that Petitioner had an existing, less-expensive, attendant care program in the community.

B. The Third Circuit Correctly Declined To Follow Decisions Under The Rehabilitation Act.

Petitioner asserts that the Third Circuit erred in declining to follow decisions in which courts had rejected claims under the Rehabilitation Act similar to that asserted by Idell S. under the ADA because Congress implicitly adopted those decisions in the ADA. Pet. Br. at 8-13. Petitioner's argument rests on an incorrect premise that the Rehabilitation Act is monolithic and that any judicial decision issued pursuant to that statute's regulations is applicable automatically to cases under Title II of the ADA. In fact, there are a multitude of varying regulations under the Rehabilitation Act (each federal agency promulgated its own regulations) and 28 C.F.R. § 35.130(d), the ADA

regulation adopted by DOJ pursuant to express congressional direction, differs significantly from 45 C.F.R. § 84.4(b)(2), the Rehabilitation Act regulation at issue in Plummer v. Branstad, 731 F.2d 574, 579 (8th Cir. 1984), and Clark v. Cohen, 613 F. Supp. 684, 691 (E.D. Pa. 1985), aff'd, 794 F.2d 79, 84-85 n.3 (3d Cir.), cert. denied, 479 U.S. 962 (1986), on which Petitioner relies.

Unlike the detailed statutory provisions in Titles I and III of the ADA, Title II of the ADA contains a general prohibition on disability-based discrimination by public entities, 42 U.S.C. § 12132, and required DOJ to promulgate regulations to implement that prohibition. 42 U.S.C. § 12134(a).[4] While Congress could have

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[4]Given Congress's delegation of authority to DOJ to promulgate regulations to implement the ADA, 42 U.S.C. § 12134(a), it is difficult to fathom Petitioner's assertion that the appellate court's interpretation of the ADA and its implementing regulations is inconsistent with the "plain statement" rule. The combination of the ADA's statutory requirement that DOJ incorporate the Rehabilitation Act's coordination regulations, see discussion infra, together with the other provisions of the ADA that define segregation as a form of prohibited discrimination make the application of Section 35.130(d) to the facts of this case consistent with the 'plain statement' rule. As for the regulation itself, Section

simply required DOJ to adhere to regulations under "the" Rehabilitation Act, it was aware that every federal department and agency had promulgated different regulations under the Rehabilitation Act and that those regulations were not identical. Congress specifically instructed DOJ to promulgate regulations under Title II that were consistent with the "coordination regulations" at 28 C.F.R. Part 41 (other than program accessibility for existing facilities and communications). 42 U.S.C. § 12134(b). Congress's choice of the "coordination regulations" as the model for the Title II ADA regulations represents a deliberate policy decision based on its recognition of significant differences between the varying sets of Rehabilitation Act regulations.

35.130(d) is quite explicit. Indeed, it is Petitioner who seeks to imply words of limitation into the regulation that do not exist. Petitioner's citation to Pennhurst v. State School & Hospital v. Halderman, 451 U.S. 1 (1981), and Gregory v. Ashcroft, 501 U.S. 452 (1991), is thus inapposite. While Pennhurst and Gregory involved amorphous, statutory provisions, the plain, unambiguous language of 28 C.F.R. § 35.130(d) -- along with its definitive interpretation by DOJ -- eliminates any dispute that it is obligatory and that its scope extends to all services provided by public entities.

The ADA regulation at issue here, 28 C.F.R. § 35.130(d), is drawn virtually verbatim from 28 C.F.R. § 41.51(d), one of the "coordination regulations" that DOJ was bound to follow pursuant to 42 U.S.C. § 12134(b). Significantly, the language of 28 C.F.R. § 41.51(d) and 28 C.F.R. § 35.130(d) differs markedly from the language of the Rehabilitation Act regulation adopted by the Department of Health and Human Services ("HHS"), 45 C.F.R. § 84.4(b)(2). HHS's regulation, at issue in Clark and Plummer, explicitly applied only to those services available to all persons -- those with and without disabilities -- and did not apply to services provided only to people with disabilities.

Accordingly, Petitioner's observation that Congress is presumed to be aware of interpretations of prior law when enacting law on the same subject, Pet. Br. at 12-13 (citing, inter alia, Lorillard v. Pons, 434 U.S. 575, 580-81 (1978)), is correct, but her conclusion is erroneous. Congress's explicit statutory mandate that DOJ follow the "coordination regulations" means that Congress did not want to adopt in the ADA those decisions, including Clark and Plummer, issued pursuant to Rehabilitation Act regulations other than the

coordination regulations. Since no court ever ruled on the scope and application of 28 C.F.R. § 41.51(d) (the coordination regulation), there are no Rehabilitation Act cases pertinent to the scope and application of its ADA analog, 28 C.F.R. § 35.130(d).[5]

C. Petitioner Misrepresents The Ramifications Of The Third Circuit's Decision.

The Petition in this case is based essentially on doomsday predictions of deinstitutionalization, fiscal and administrative chaos and sundry other far-reaching consequences. A careful reading of the Court of Appeals' decision, however, reveals no basis for Petitioner's concerns. To the contrary, the decision is quite narrow and limited to facts to which DPW stipulated.

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[5]Petitioner incorrectly implies that decisions such as Clark and Plummer under the Rehabilitation Act sub silentio rejected any claim that 28 C.F.R. § 41.51(d) required the provision of services available only to people with disabilities in the most integrated setting. The courts' silence as to the application of 28 C.F.R. § 41.51(d) cannot be imbued with any meaning since that provision applied only to federal agencies -- not to the state recipients of federal funding who were the defendants in those cases. 28 C.F.R. § 41.2.

As the Court of Appeals correctly concluded, Pet. App. at A-20, this case does not require and will not result in deinstitutionalization or the creation of an entitlement to community services for several reasons.

- The decision applies to a single individual who DPW agreed could be served most appropriately and less expensively in her own home through DPW's existing community-based attendant care program rather than in the nursing facility. The outcome turned on the facts to which DPW stipulated.
- Neither the ADA nor its regulations require a public entity to provide community services to individuals in institutions if they are not appropriate for those services based on an individualized, fact-specific inquiry. The personalized decision-making required by the ADA negates the possibility that someone might utilize this statute to support a class-based remedy to close an institution in one fell stroke.

- Neither the ADA nor its regulations require a public entity to provide any services whatsoever (and thus creates no entitlement to services). Rather, it simply requires that if the public entity chooses to provide services, it must do so in the most integrated setting appropriate to the individual's needs as long as doing so would not create an undue burden or fundamental program alteration.
- Neither the ADA nor its regulations require a public entity to provide services in non-institutional settings to individuals who are institutionalized if doing so would result in an undue burden or a fundamental program alteration. The availability of this defense negates Petitioner's argument that the court's decision can be used to achieve massive deinstitutionalization.[6]

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[6]Petitioner incorrectly cites Wyatt v. Hanan, Civil Action No. 3195-N (M.D. Ala. Mar. 6, 1995) (Pet. App. at A-42-A-43), for the proposition that the Court

Petitioner's assertion that it would impose an undue burden on DPW to provide attendant care services to Idell S. in her own home rather than in a nursing facility substitutes conjecture for the stipulated facts in the case. DPW cannot seriously assert that the decision will impose an undue fiscal burden since, as Petitioner admitted, it will cost DPW less to provide services to Idell S. in the community than in the nursing facility. See Pet. App. at A-23; J.A. at 245. As for any administrative burden, DPW's post-hoc argument that the Court of Appeals ignored the "administrative and adjudicative burden of assessing 'appropriateness'", Pet. Br. at 16, 20-21, is belied by DPW's stipulation that Idell S. was appropriate for the community, Pet. App. at A-6 & n.6; J.A. at 245, 246,

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of Appeals decision will have a broad impact and will result in "deinstitutionalization" or create any "entitlement". Wyatt recognized that the Court of Appeals' decision in this case did not require "unqualified and indiscriminate deinstitutionalization and community placements." It therefore refused to grant plaintiffs' motion for summary judgment because there remained material facts in dispute. Wyatt demonstrates that courts are not likely to construe the decision in this case to mandate deinstitutionalization or community services.

and by the fact that federal law already requires DPW to make determinations of the propriety of nursing facility treatment. See 42 C.F.R. § 456.609(b)-(c) (requiring states to inspect nursing facilities to determine whether certain residents need to remain in such facilities or whether their needs can be met through alternative institutional or non-institutional services). Such assessments neither have overwhelmed DPW nor have flooded the judiciary with claims.

Petitioner also misstates the facts when she contends that the provision of services to Idell S. in the community will result in a fundamental alteration of DPW's program. As the Court of Appeals emphasized, DPW already had a program in existence to provide in-home attendant care services, Pet. App. at A-23, and thus it would not have to create a new program. The decision also did not require Petitioner to violate state law by taking money allocated for nursing facility services and using it to fund attendant care services; indeed, Petitioner presumably did not violate state law when she ultimately provided Idell S. with attendant care services in her own home. Pet. Br. at 5.

Additionally, the fact that Petitioner has provided Idell S. with attendant care services in her home since December 1994 belies Petitioner's argument that the provision of these services would cause either an undue burden or a fundamental alteration of its existing programs. To the contrary, it demonstrates that DPW's earlier refusal to provide her with services in her home, when such services are less expensive than in the nursing facility, was quixotic.

Finally, this case does not prohibit, as Petitioner suggests, the use of waiting lists nor require a public entity to provide "immediate" community services. Waiting lists do not violate the ADA and the Court of Appeals did not rule otherwise. Respondent has never argued that people with disabilities who live in the community have a right to any services and, therefore, if a public entity chooses to limit community services, then those individuals must remain on a waiting list. Here, however, DPW knew that Idell S. was unnecessarily segregated for years in a nursing facility and did nothing to assure that she received attendant care services in her own home rather than the nursing facility even though it would cost the state less to

provide her with in-home rather than institutional services. Moreover, neither the decision of the Court of Appeals nor the ADA require public entities to establish programs -- with or without waiting lists -- if doing so would constitute an undue burden or a fundamental alteration of any of DPW's programs.

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY OTHER FEDERAL COURT OF APPEALS OR ANY STATE COURT OF LAST RESORT.

No other federal court of appeals or any state court of last resort has ever interpreted or applied the specific ADA regulation, 28 C.F.R. § 35.130(d), to circumstances similar to the facts in this case.[7] Petitioner's contention that the decision in this case conflicts with the decision in Williams v. Sec'y of the Executive Office of Human Services, 414 Mass. 551, 609 N.E.2d 447 (1993), is incorrect because it did not

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[7]In fact, since the enactment of the ADA, there have been only seven published federal appellate court decisions and only five decisions of state courts of last resort regarding any provision of Title II of the ADA or any of its regulations.

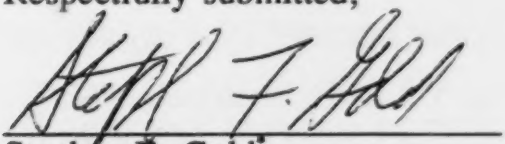
apply to a person who was unnecessarily segregated in an institution. Pet. Br. at 6-7.

Unlike Idell S., plaintiffs in Williams were individuals with mental disabilities who lived in the community with non-disabled persons -- they were not receiving services in a segregated setting -- and they alleged that the state violated 28 C.F.R. § 35.130(d) by failing to provide them with "a sufficient amount of integrated supported housing". 609 N.E.2d at 451-52. The Williams Court correctly concluded that plaintiffs were not entitled to services since they "did not show that any particular client's placement was inappropriate, or that they themselves were inappropriately placed in a segregated setting after the ADA's effective date." Id. at 453 (emphasis added). The Williams Court did not hold that 28 C.F.R. § 35.130(d) would be inapplicable in a case, such as that presented by Idell S., in which the plaintiff alleges that she was inappropriately placed in a segregated setting. Thus, Williams does not conflict with the decision in this case.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,



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No. 94-1946

IN THE

Supreme Court of the United States

October Term, 1994

SECRETARY OF PUBLIC WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

IDELL S.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE STATES OF FLORIDA, HAWAII AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF THE PETITIONER*

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No. 94-1946

IN THE

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SECRETARY OF PUBLIC WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE AMICI CURIAE IN SUPPORT OF THE PETITIONER

THE INTEREST OF THE AMICI CURIAE

On May, 17, 1995, Assistant Attorney General Deval Patrick wrote Lawton Chiles, the Governor of Florida, to announce the U.S. Justice Department's intention to conduct an investigation of a Florida state mental hospital pursuant to its authority under the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. s. 1997.

The department intends to look at a variety of conditions at the hospital, including whether there has been a "failure

to provide services to residents in the least separate, most integrated setting."[1]

The State of Florida has no reason to doubt that the Justice Department will urge upon the district courts in Florida the same interpretation of the Americans with Disabilities Act (ADA), 42 U.S.C. ss. 12131 and 12132, and 28 C.F.R. s. 35.130(d) that it did in the present case.

Since the Justice Department acts under CRIPA throughout the country, all states now face exposure to the ADA interpretation found in *Helen L. v. DiDario*, 46 F.3d 325 (3d Cir. 1995). This means that the issue presented here will be re-litigated throughout the nation, imposing significant costs on the states, the federal government and the federal courts.

REASONS FOR GRANTING THE WRIT

I. THE PETITION PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT.

The court of appeals' decision has broad implications not only for the manner in which services are provided to the physically disabled like Idell S., but to the disabled in all categories.

The opinion essentially requires states to reduce their waiting lists for services to zero. That is, when a disabled person resides in a setting deemed restrictive (as in a state

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1 The terms "least restrictive alternative" or "integrated setting" are euphemisms for community-based treatment; that is, treatment for the problems of the disabled in settings outside institutions or large congregate facilities. Arrigo, *The Logic of Identity and the Politics of Justice*, 18 New Engl. J. On Cr. and Civil Conf. 1 (1992).

hospital or a nursing home) and she can function in a less restrictive setting with some help (like Idell S. at home), the states must fund that less restrictive placement.

The practical effect of this decision may be even broader, and is startling in its implications. For the court of appeals' decision could be read as a mandate to states to fully fund their community-based programs to meet the demand. Since the Justice Department acts under CRIPA on behalf of large classes of the disabled, this will be the practical outcome of *Helen L.*

With between 9-11 million Americans of all ages who are chronically disabled and require some help,[2] the cost will be more than the states can bear.

The fiscal impact on the states is impossible to estimate with precision. However, there is no doubt that it will be enormous. This impact is of sufficiently great importance to justify this court's review of the case.

A. The impact on the states' mental health systems.

Coming to grips with the cost to the states of the opinion below is beyond the scope of any mere legal brief. The range of disabilities is broad and the needs vary from person to person, and the costs vary from state to state and program to program.

However, it is helpful to study the effects of the circuit court's opinion on one area, such as mental health care.

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2 Kinney, Freedman, Cook, *Quality Improvement in Community-Based Long-Term Care: Theory and Reality*, 20 Am. J. L & Med. 59 (1994).Congress concluded there were 43 million Americans with some kind of disability. 42 U.S.C. s. 12101(a)(1).

Nationwide, there are an estimated four-five million people with serious, debilitating mental illness.[3] More than 90,000 of the seriously mentally ill are treated in state and locally funded mental hospitals.[4] [5] The national cost of all mental health services in 1991 was estimated at $58 billion.[6] The states are estimated to carry one-third the cost of all mental health services.[7] State and local mental hospital costs alone were about $3.8 billion in 1990.[8] Florida's budget for community-based adult mental health care in fiscal year 1995-1996 is $155.7 million. The state has approximately 1,950 patients in six state mental hospitals at an annual cost of $248 million for fiscal year 1995-1996.[9]

The national trend since the late 1950s has been to reduce state hospital populations, and hospital populations

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3 *Deinstitutionalization, Mental Illness and Medications*, Hearing before the Committee on Finance, United States Senate, May 10, 1994, S. Hrg. 103-1011 at 7; Baker, Manderscheid, Hendershot, Jack, Schoenbron, Goldstrom, *Serious Mental Illness and Disability in the Adult Household Population: United States 1989*, Centers for Disease Control, U.S. Department of Health and Human Services, report no. 218, Sept. 16, 1992, at 1.

4 Redick, Witkin, Atay and Manderscheid, "Highlights of Organized Mental Health Services in 1990 and Major National and State Trends," *Mental Health, United States 1994*, Substance Abuse and Mental Health Services, Public Health Service (1994) at 101.

5 By comparison, about 78,000 people with developmental disabilities nationally were institutionalized in 1992. Braddock, Hemp, Bachelder and Fujiura, *The State of the States in Developmental Disabilities*, American Association of Mental Retardation (4th ed. 1995) at 10.

6 Senate Hearing 103-1011, *supra* at note 3, at 65.

7 *Id.* at 14.

8 *Id.* at 52.

9 These people are seriously mentally ill. Most of them are involuntarily committed because they are a danger to themselves or others. See s. 394.467, Fla. Stat. (1993).

have fallen considerably since then.[10] Meanwhile, the states have expanded community-based programs, and every state affords some kind of community-based care outside state mental hospitals.[11] Each state structures its community-based mental health care system differently, but the systems fall into three general categories: a) states operating their systems directly (6); b) states contracting with nonprofit organizations that provide services (30); and c) states funding county and city health boards that operate community facilities (13).[12]

Despite a great increase in the size, number and quality of community-based programs, the general criticism of activists and many commentators is that the states haven't done enough to meet the need for community-based treatment. That is, they haven't spent enough money.[13]

State legislatures, however, must make tough choices when setting budget priorities. Resources are limited, needs are infinite, and consequently, the competition for funds is fierce. Because of the high cost, many states have shied away from providing all the services that evolving

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10 Senate Hearing 103-1011, *supra* at note 3, at 1-2, remarks of Senator Moynihan; J. LaFond and M. Durham, *Back to the Asylum: The Future of Mental Health Law and Policy in the United States* (1992) at 12.

11 T. Lutterman, "The State Mental Health Agency Profile System," *Mental Health, United States 1994*, Substance Abuse and Mental Health Services, Public Health Service (1994), at 183.

12 *Id. See also* Ridgway and Zipple, *The Paradigm Shift in Residential Services: From the Linear Continuum to Supported Housing Approaches*, 13 Psychosocial Rehabilitation Journal 11 (1990).

13 Benson, *Deinstitutionalization and Family Caretaking of the Seriously Mentally Ill*, 17 Int. J. of L and Psychiatry 119 (1994) at 132.

professional judgment might think necessary to everyone who demands them.[14]

If Florida must provide care in less restrictive settings for those on waiting lists for services, we estimate an additional cost of $52.4 million for fiscal year 1995-1996.

But the court of appeals decision may require the states to go further. The case's strict holding was that a paralyzed woman living in a nursing home on a waiting list for services at home had a right under the ADA to those home-based services. But its implications are far more extensive. Assume, for example, that the respondent is disabled but not yet receiving services. When she applies for services, she finds she qualifies for services both at the nursing home and through Pennsylvania's home-based program. However, because the home-based program is full, her only choice is to enter the nursing home. While we would urge another reading of the court of appeals' decision, it might be seen to require the respondent's placement in the home-based services program. In this way, the court of appeals decision might be stretched to require the states to fully fund all services for the disabled for community-based mental health care, and could even be taken to require deinstitutionalization.[15]

Such an undertaking would seriously strain the resources of state governments. In Florida, we estimate the cost of

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14 LaFond and Durham at 126. The authors have also pointed out that many courts "also realize[] that, in a world of limited financial resources, articulating and enforcing the rights of one group, such as institutionalized mental patients, usually meant less money spent on others not present or represented before the courts..." *Id.* at 14.

15 At least one advocate for the disabled has taken the view that the ADA requires the provision of a full-time attendant to enable a disabled person to live at home. *See* Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L.Rev. 393, 429 (1991).

eliminating the waiting lists and meeting the full need for community-based mental health services to be an additional $163.5 million for the fiscal year 1995-1996.

Expanding community mental health care is generally thought to be a good thing, and in fact, providing for home-based care is the current mental health vogue.[16] However, there will always be a need for restrictive placements, and while expanding their community-based systems, the states are unlikely to close their mental hospitals or similar facilities.[17]

As officials of the executive branch, we cannot, of course, speak for what our state legislature will do if presented such a bill. However, many state legislatures believe they are funding services to the limit of their resources. Indeed, there may be enough reluctance to stop the trend toward the reduction of state hospital populations and the development of community-based care. The least one might expect is a one-size-fits-all type of service delivery, with services offered at only one kind of site, with one level of restrictiveness, and with the consequent stifling of the innovation so necessary to the evolution of mental health delivery systems. For the circuit court's opinion clearly portends that if a state creates a service for one disabled person, it must fund that service for all disabled people who qualify. If that is so, the states will not want to expose themselves to the limitless expense such a ruling will mean. In short, one of the corollaries to Murphy's Law — the law of unintended consequences — may produce results that the court of appeals and, certainly, Congress (in the circuit court's view) did not expect.

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16 Benson, *supra*; Ridgway and Zipple, *supra*.

17 Senate Hearing 103-1011, at 100.

We seriously doubt that Congress intended to impose such costs on the states, as an unfunded mandate in disguise, without some express intention to do so. *See Alexander v. Choate*, 469 U.S. 287, 298-299 (1985).[18]

In its findings in the ADA, Congress made two passing references to segregation and institutionalization that the circuit court seized on as demonstrating an intention to require that treatment of the disabled take place in the most integrated setting. In 42 U.S.C. s. 12101(a)(2), Congress said that "historically, society has tended to isolate and segregate individuals with disabilities" and it referred to that as discrimination. In s. 12101(a)(3), Congress said "discrimination against individuals with disabilities persists in such areas as...institutionalization..."

Yet in Title II, Congress did not address the issue of deinstitutionalization or segregation in the context presented in this case: services available solely to the disabled for treatment. Section 12131(2) provides simply:

> (2) Qualified individual with a disability. — The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

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18 "Had Congress intended s. 504 [of the Rehabilitation Act] to be a National Environmental Policy Act for the handicapped, requiring 'Handicapped Impact Statements' before any action was taken by a grantee that affected the handicapped, we would expect some indication of that purpose in the statute or its legislative history."

Section 12132 states:

Sec. 202. Discrimination.

> Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity.

Thus on their face, the operative parts of the statute say nothing about "integration." They only provide that a disabled person shall not be "excluded from participation in or be denied the benefits of services" or "be subjected to discrimination." None of these words is specifically defined, and therefore they take their plain ordinary meaning. *Smith v. U.S.*, ___ U.S. ___, 113 S.Ct. 2050, 2054 (1993). That plain meaning — which is not ambiguous — expresses no Congressional intention about "integration" in the context presented by this case. The plain meaning addressed a wholly different issue — unequal or segregated access to services provided to the general public. Said another way, s. 12131 and 12132 require the states, when offering services to the general public, not to segregate or isolate the disabled but to serve them in the same setting as the nondisabled and not to deny the disabled access to public services because of their disability — in a word, equality of access.

This language, then, is not enough to put the states on notice that they will be required to provide services designed *solely* for the disabled, which are intended as *treatment* or to enable them to function, in a particular setting.

Nor does the legislative history suggest that interpretation. The legislative history makes clear that Congress' model was race and the elimination of separate-but-equal services.[19] So, if services are available to the nondisabled, they must be made available without discrimination to the disabled *in the same setting*. Separate but equal is forbidden. Only through heedless use of the word "integration" does one arrive at the conclusion that it means that treatment of the disabled must take place in an integrated or community setting.

At the time of the ADA's passage, it appears that the Justice Department's view of the ADA and "integration" was different from its view today. Then-Attorney General Richard Thornburgh said at the time that the ADA's purpose was to overcome barriers to services, mandating "true access for Americans with disabilities to mainstream society."[20] It is clear from the context that General Thornburgh's understanding was that the barrier was to services provided to the public generally. The department's explanation of 28 C.F.R. s. 35.130(d) at the time of its promulgation does not give any hint of the interpretation

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19 See comments of Senator Metzenbaum: "Now, as we prepare to vote on the ADA, we face a decision. We're at a turning point. Do we want to extend civil rights protection to Americans with disabilities? Do we want to build on the great American promise of inclusion, and bring people with disabilities into the fold?

"Our failure to do so would be like turning back the clock. It would be tantamount to dredging up a 'whites only' sign and hanging it at a nearby lunchcounter." 135 Cong.Rec. S10797 (Sept. 7, 1989).

20 Thornburgh, *The Americans with Disabilities Act: What it Means to All Americans*, 64 Temp. L.Rev. 375, 377 (1991).

now placed on the regulation. See 56 Fed.Reg. 35,703 (1991).[21]

Congress knows very well how to impose an integration mandate on the states. *See, e.g., Oberti v. Board of Education,* 995 F. 2d 1204 (3d Cir. 1993) (Individuals with Disabilities Education Act requires mainstreaming of disabled children). And, in fact, Congress provided for an integration mandate in the ADA — but not one that affected states. In Title III, Congress required that services offered to the disabled by "public accommodations" be provided in an integrated setting.[22] Public accommodations, however, are defined as private entities, not public entities.[23] (And even in this instance, Congress' intention was to eliminate separate-but-equal services to the disabled.)

That Congress did not clearly provide for "mainstreaming" or "integration" of the disabled who receive special *public* services unique to them *because of their disability as treatment* provides strong evidence that Congress ultimately lacked the intention to impose the substantial cost of doing so on the states.

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21 When the Justice Department talked about seclusion, segregation and integration, it did so in the context of providing the disabled with the same services provided the nondisabled: "Integration is fundamental to the purposes of the Americans with Disabilities Act. Provision of segregated accommodations and services relegates persons with disabilities to second-class status. *For example,* it would be a violation of this provision to require persons with disabilities *to eat in the back room* of a government cafeteria or to refuse to allow a person with a disability the *full use of recreation facilities* because of stereotypes about the person's ability to participate." (Emphasis added)

22 42 U.S.C. s. 12182(b)(1)(B): "Integrated settings. — Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual."

23 *Id.* s. 12181(7).

Thus, 28 C.F.R. s. 35.130(d) should be read in light of the congressional mandate to eliminate separate-but-equal services to the disabled — when those same services are provided to the nondisabled. The circuit court's interpretation of this regulation, giving it the force of law, *Helen L.*, 46 F.3d at 332, is unsupported by the clear language of the statute and the legislative history.

Thus, because of the substantial costs imposed on the states by the court below, the Justice Department's clear intention to project the lower court's opinion nationwide, and the lack of a clearly expressed congressional intention to impose a massive unfunded mandate on the states, this court should grant the writ.

B. The circuit court's opinion unnecessarily violates principles of comity and federalism and fundamentally alters the petitioner's program.

An issue of grave concern to the amici is the way the circuit court overrode state constitutional limitations on the spending of state money. Idell S. was on a waiting list for home-care services because there wasn't enough money appropriated to put her immediately in the program. *Helen L.*, 46 F.3d at 329. Pennsylvania constitutional law prohibited the petitioners, executive branch officials, from taking money appropriated for other purposes and spending it on the respondent's home-based care. Florida, like most states, has the same constitutional separation of powers limitations on the handling of public money. *See Chiles v. Children A-F,* 589 So.2d 260 (Fla. 1991).

Yet the circuit court brushed aside these limitations, *Helen L.*, 46 F.3d at 336-339, saying simply that Pennsylvania could not rely on its funding mechanism "to justify administering its attendant care program in a manner that

discriminates and then argue that it cannot comply with the ADA without fundamentally altering its program." *Id.* at 338.

The upshot of the court's opinion is that if a state chooses to create a program to benefit or to treat only the disabled, and it funds that program to a level allowing services only to one person, it is bound to expand that program without limit until all who meet its eligibility requirements are served. Admitting one disabled person means having to admit all. Thus, once a state chooses to create a treatment program, it will have no control over its cost or scope.

This holding poses a serious threat to the states' abilities to set fiscal priorities — a matter that lies at the heart of state sovereignty and the structure of the federal system. *See, e.g., Missouri v. Jenkins*, 495 U.S. 33 (1990); *cf. Traynor* v. Turner, 485 U.S. 535, 549 (1988) (Congress is entitled to establish priorities for the allocation of the limited resources available for benefits).

Finally, we dispute the circuit court's view that no fundamental alteration of Pennsylvania's program was involved. State programs are not freestanding. They rest in a web, the structure of state government. A program's funding determines its size and its nature, including the scope of services to be provided and the manner in which they will be provided. It is not uncommon for state legislatures to issue broad mandates, such as to provide care for all who need it or to provide care in the least restrictive setting, and then fail to appropriate enough funds to serve all who need help. In fact, the level of appropriations signals a legislature's true intentions for a program. Thus, the funding mechanism is as much a part of the program as the services to be delivered. By trampling on the funding mechanism, the circuit court fundamentally changed the structure of Pennsylvania's program, its government, and the fabric of its polity.

Moreover, eligibility was implicitly conditioned on adequate funding. By ordering the petitioner to provide home-based services, the circuit court altered those implicit eligibility requirements.

Therefore, the circuit court's opinion had a profound effect: it expanded the program. True, it only expanded it by one person, but its legal conclusion left the door open to anyone who qualifies. Pennsylvania has lost the ability to set its own budget and to control its own costs.

Certainly, this constitutes a fundamental alteration in Pennsylvania's program as contemplated by *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), and *Alexander v. Choate*, 469 U.S. 287 (1985).

CONCLUSION

For these reasons, we submit that the questions presented by this case are of national importance, and they should be resolved by this court. Therefore, we urge the court to grant the writ.

Respectfully Submitted,

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